Supreme Court, U.S.
FILED

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No. 09-___

IN THE
Supreme Court of the United States

WORLDWIDE NETWORK SERVICES, LLC, AND
WORLDWIDE NETWORK SERVICES INTERNATIONAL, FZCO,

Petitioners,

v.

DYNCORP INTERNATIONAL LLC,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A plaintiff who prevails on a claim of race discrimination in contracting under 42 U.S.C. § 1981 may obtain punitive damages if the defendant acted with malice or with reckless indifference to the plaintiff's rights under federal law. *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). The question presented is:

Whether evidence of overt and egregious intentional discrimination on the basis of race can support an inference that the defendant acted with malice or with reckless indifference to the plaintiff's federally protected rights, as the First, Second, Third, Sixth, Eighth, and Ninth Circuits have held, or is to be ignored in review of the award, as the Fourth Circuit ruled here.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 DISCLOSURES

Petitioner Worldwide Network Services, LLC, has no parent corporation, and no publicly owned corporation owns ten percent or more of its stock. Petitioner Worldwide Network Services International, FZCO, is wholly owned by Worldwide Network Services, LLC, and no publicly owned corporation owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Worldwide Network Services, LLC, and Worldwide Network Services International, FZCO, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 4a) and its order denying rehearing (App., *infra*, 1a) are unreported. The order and judgment of the district court (App., *infra*, 64a) are also unreported.

JURISDICTION

The Fourth Circuit denied the timely petition for rehearing on March 29, 2010. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1981 of Title 42 of the United States Code provides:

> **§ 1981. Equal rights under the law**
>
> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of

every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

Following a trial in the Eastern District of Virginia, a jury found the defendant liable for race discrimination in contracting in violation of 42 U.S.C. § 1981, based on extensive evidence of overt racial discrimination, express racial epithets, racially offensive caricatures of African Americans by high-level executives at corporate meetings and an official corporate function. The jury awarded contract, compensatory, and punitive damages to the plaintiffs. In a decision in which the panel divided three different ways, the Court of Appeals for the Fourth Circuit overturned the punitive damages award for insufficient evidence of *mens rea*. In so ruling, the court of appeals declined to address or consider whether the egregiousness of the discriminatory conduct itself would support a jury inference of intentional or reckless indifference to federally protected rights. That ruling conflicts with the rulings of six other circuits and with binding precedent from this Court.

1. Petitioners Worldwide Network Services, LLC, and Worldwide Network Services International, FZCO (collectively, "WWNS") specialize in the deployment of information technology and communications networks in high-risk environments, including theaters of military conflict like Iraq and Afghanistan. C.A. J.A. 586-587. Walter Gray and Reginald Bailey, both of whom are African Americans, head the company, which is certified by the Small Business Administration as a Section 8(a) disadvantaged company. 15 U.S.C. § 637(a); C.A. J.A. 41, 592-594. In 2004, respondent DynCorp awarded WWNS a four-year contract to provide

communication and information technology services for DynCorp's "CIVPOL" contract with the State Department, which supported civilian police programs in Iraq and Afghanistan. C.A. J.A. 42, 596, 1234-1235, 1606-1607.

Although WWNS had received "excellent" and "good" reviews for its work, DynCorp's and WWNS's relationship deteriorated when DynCorp brought in new management in December 2005. App., *infra*, 10a. The new Information-Technology Manager was a South African, Leon DeBeer, who called Mr. Gray a "nigger," "kaffir," and a "bush baby." App., *infra*, 12a; C.A. J.A. 872, 931.[1] In addition, "two to three times a week," DeBeer would state that "people of Anglo descent"

> had made a grave error, that error being that we had taken the black man as a youth and attempted to clothe him and send him to school, and that we were quite erroneous in this, and that the proper role of the black man was to go out and kill a lion, proving his manhood, at which point he should be put to work to feed his family * * * and mated with a woman.

App., *infra*, 12a; C.A. J.A. 874. He also said that the end of WWNS's contractual relationship with DynCorp "was being manufactured by" persons within DynCorp. App., *infra*, 12a; C.A. J.A. 869. In addition, Richard Walsh, the Vice-President of Operations, called Gray "a stupid black mother* * *."

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[1] In South Africa, "kaffir" is a highly derogatory term used to refer to a black person. App., *infra*, 12a.

App., *infra*, 11a-12a; C.A. J.A. 1723. The Division President, Robert Rosenkranz, fired DynCorp's only minority executive, a decision that involved "discriminatory things." App., *infra*, 12a; C.A. J.A. 1019.

DynCorp's actions went far beyond ordinary contract termination between two businesses, and included driving a WWNS manager from his workplace at gunpoint, stealing all of WWNS's non-managerial employees and thus crippling its ability to continue to function as a business, and abruptly halting all payments to WWNS for already completed work without explanation, even though the federal government had paid DynCorp for the work. App., *infra*, 11a. Because almost all of the company's business came from DynCorp, those actions "nearly destroyed WWNS." App., *infra*, 11a.

DynCorp's high-level executives then "celebrated WWNS's demise during a company dinner" attended by high-level executives. App., *infra*, 12a. At that dinner, a senior executive read a fictionalized letter from Mr. Gray in Ebonics – that is, like "the character on Fat Albert." C.A. J.A. 1029. "[I]t was something like * * * we-ba going-ba, do-ba, thank-you ba." C.A. J.A. 1023. All the while, Vice-President Walsh was "laughing" and "happy," while Division President Rosenkranz "laugh[ed] his a** off." App., *infra*, 13a; C.A. J.A. 1029. Indeed, all of the executives laughed "continuously" throughout the presentation. C.A. J.A. 1152. Walsh was officially presented with a T-shirt reading "WWNS – I took them down, and all I got was this lousy T-Shirt." App., *infra*, 12a; C.A. J.A. 1139.

2. WWNS filed suit against DynCorp under, *inter*

alia, 42 U.S.C. § 1981. At trial, WWNS introduced evidence establishing that DynCorp's racially motivated breach of contract and targeted destruction of WWNS had nearly destroyed the company, causing many of its more than 100 employees to lose their jobs, and financially devastating the company. App., *infra*, 11a; C.A. J.A. 587, 670-672, 792-793, 1599-1600. WWNS also introduced evidence that it had warned DynCorp through a "cease-and-desist" letter prior to the expiration of the CIVPOL task orders that DynCorp's actions "have been racially-motivated in violation of anti-discrimination laws." App., *infra*, 60a.

After an eleven-day trial, the jury found DynCorp liable and awarded $3.42 million in compensatory damages under Section 1981.[2] The district court also entered judgment as a matter of law for WWNS on more than $2.5 million in unpaid invoices for completed work. App., *infra*, 67a. The jury awarded $10 million in punitive damages. App., *infra*, 66a.

3. A Fourth Circuit panel that was divided three ways affirmed the jury's liability determination, but reversed the punitive damages award. As relevant here, the majority expressly noted that "the record contains abundant evidence of racial animus," App., *infra*, 30a, and that the evidence supported a finding that DynCorp's stated reason for the termination "was merely a pretext for discrimination," App., *infra*, 26a.

Judge Duncan, nevertheless, went on to hold that

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[2] The jury also awarded $1.6 million for breach of contract, and $83,000 for tortious interference with contract under state law.

the punitive damages award should be vacated on the ground that "WWNS has been unable to cite any evidence that DynCorp * * * perceived [a] risk that [its] decision would violate federal law." App., *infra*, 34a. In so ruling, Judge Duncan ignored WWNS's argument (C.A. Br. 40-41) that the egregiousness of the overt discrimination evidenced DynCorp's intentional or reckless indifference to WWNS's federally protected rights.

Judge Niemeyer dissented from the majority's decision upholding the liability verdict under Section 1981. But, "to provide Judge Duncan with a majority on her discussion of punitive damages, [he] join[ed] her discussion of punitive damages in Parts II(D)(1) and (2)," but not part 3, which remanded for retrial a state-law punitive damages question. App., *infra*, 41a.

Judge Jones joined Judge Duncan's decision upholding the liability determination, but dissented from vacatur of the punitive damages award. He concluded that the egregious discrimination in this case provided "ample evidence" that DynCorp terminated its contractual relationship with WWNS "in the face of knowledge that 'it may be acting in violation of federal law.'" App., *infra*, 59a-60a (quoting *Kolstad v. American Dental Association*, 527 U.S. 526, 535 (1999)). Judge Jones further noted that the record contained additional evidence of DynCorp's malice or reckless indifference to federal law in the form of the cease-and-desist letter, a letter confirming that DynCorp's decisionmakers were on notice "regarding [DynCorp's] wrongful and improper conduct in terminating [WWNS's] services under the CivPol subcontract," and an internal DynCorp

PowerPoint presentation documenting the executives' knowledge that "WWNS is planning legal action against [DynCorp] based on racial discrimination." App., *infra*, 60a; C.A. J.A. 2694, 2788.

WWNS's petition for rehearing and rehearing en banc was denied. App., *infra*, 1a.

REASONS FOR GRANTING THE WRIT

The refusal of the sharply divided court of appeals to accept egregious "evidence of racial animus" as supporting a finding of malice or reckless indifference to federally protected rights squarely conflicts with binding precedent from this Court and with the decisions of numerous other circuits on a question of significant and recurring importance to the enforcement of civil rights laws. Moreover, this case, with its record evidence of overtly racist comments and caricatures made by senior level executives of a major corporation, cleanly presents that question for review because the court of appeals itself accepted that the evidence of racial discrimination was "abundant," App., *infra*, 30a, yet deemed it irrelevant to the punitive damages question. Accordingly, this Court's review is warranted.

I. THE COURT OF APPEALS' REJECTION OF OVERT DISCRIMINATORY CONDUCT AS EVIDENCE OF MALICE OR RECKLESS INDIFFERENCE TO FEDERAL RIGHTS SQUARELY CONFLICTS WITH THIS COURT'S PRECEDENT

In *Smith v. Wade*, this Court held that punitive damages are available under 42 U.S.C. § 1983 "when

the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 461 U.S. 30, 56 (1983). In so holding, this Court relied on the common law tort standard and could "discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." *Id.* at 48-49. There is no dispute in this case that the same standard governs claims arising under 42 U.S.C. § 1981.[3]

In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), this Court held that, to satisfy that standard, the defendant "must at least discriminate in the face of a perceived risk that its actions will violate federal law," *id.* at 536.[4] While egregious acts are not a prerequisite to punitive damages, *id.* at 534-535, this Court specifically held that "egregious misconduct is evidence of the requisite mental state," *id.* at 535, and that "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive,'" *id.* at 538. Accordingly, "evidence of an employer's egregious behavior would provide one means of satisfying the plaintiff's burden to 'demonstrat[e]' that the employer acted with the

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[3] *See, e.g., Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000); *Berger v. Iron Workers Reinforced Rodmen*, 170 F.3d 1111, 1139 n.17 (D.C. Cir. 1999) (en banc); *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986).

[4] The statute at issue in *Kolstad*, 42 U.S.C. § 1981a(b)(1), frames the standard as "malice or * * * reckless indifference to the federally protected rights of an aggrieved individual." *See Kolstad*, 527 U.S. at 535 (Congress looked to *Smith* in adopting language in Section 1981a).

requisite 'malice or * * * reckless indifference.'" *Id.* at 539 (citation omitted).

In this case, the court of appeals acknowledged the "abundant" evidence of overt racial discrimination, App., *infra*, 30a, but refused to factor it into its punitive damages analysis, instead vacating the jury's award because of the perceived absence of direct evidence about DynCorp's high-level executives' familiarity with legal rules. App., *infra*, 34a-35a. Indeed, the court of appeals' analysis of its own caselaw outlines a pattern of Fourth Circuit decisional law that upholds punitive damages awards only when the record contains direct evidence that the particular individuals' were "specifically aware" of the state of the law in the form of posters, training, or individualized review of legal documents. *Id.* at 34a (quoting *EEOC v. Federal Express Corp.*, 513 F.3d 360, 373 (4th Cir. 2008)). When the evidence of malice or reckless indifference instead takes the form of "severe or pervasive" discrimination (whether race or sex discrimination), the Fourth Circuit vacates punitive damages awards. App., *infra*, 34a (discussing and quoting decision vacating punitive damages award in *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc), notwithstanding the "severe or pervasive" sex discrimination suffered in that case). *See also Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002) (considering egregiousness of misconduct only in conjunction with direct evidence that employer knew such conduct might violate federal law).

The Fourth Circuit's persistent refusal to consider the egregiousness of discriminatory conduct as evidence of the requisite mental state for punitive

damages has now culminated in this case, where even Fortune 1000 Presidents and Vice-Presidents are held as a matter of law to be presumptively ignorant of their duty not to destroy a company because of its ownership by "nigger[s]," "kaffir[s]," and "bush bab[ies]." App., *infra*, 12a; C.A. J.A. 872, 931.

That rule that egregious evidence of racism itself cannot establish the requisite mental state squarely conflicts with *Kolstad* and, indeed, defies the Court's holding that "egregious behavior would provide one means of satisfying the plaintiff's burden," 527 U.S. at 539; *see* WWNS C.A Br. 40 (citing and quoting relevant *Kolstad* language). What this Court in *Kolstad* understood – and the Fourth Circuit overlooked in this case and *Ocheltree* – is that "deterrence of future egregious conduct is a primary purpose of * * * punitive damages," *Smith*, 461 U.S. at 49, and highly egregious "acts of intentional discrimination are just the sort of conduct that punitive damages aim to deter," *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001); *see also Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994) ("The purpose of punitive damages under § 1983 is to deter future egregious conduct in violation of constitutional rights."); *United States for Use and Benefit of Evergreen Pipeline Constr. Co., Inc. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 160 (2d Cir. 1996) (New York law) ("[T]he purpose of awarding punitive damages is * * * to punish the defendant and to deter egregious conduct.").

The court of appeals made no effort to reconcile its decision with *Kolstad*, woodenly forging ahead down the path broken by *Ocheltree* and simply

disregarding the very evidence that this Court has held can be critical and sufficient evidence to support punitive damages. Indeed, the departure from controlling precedent is so stark in a case of such high-level and high-profile race discrimination as to warrant summary reversal under *Kolstad*.

To be sure, the 67-page decision in this case was unpublished. But that is because the court implemented once again the rule it adopted in its en banc decision in *Ocheltree*, which held that malice or reckless indifference to federally protected rights could not be inferred "either directly or by imputation" by the "severe or pervasive" nature of the discrimination itself. *Ocheltree*, 335 F.3d at 327, 336; *see* App., *infra*, 34a (applying and following *Ocheltree*).

With some frequency, this Court grants certiorari to review unpublished decisions, particularly when, as here, they reflect the continued application, expansion, and entrenchment of a prior published decision that conflicts with the law of this Court or of other circuits, *see infra*. *See, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 1133 (U.S. Jan. 15, 2010) (No. 09-448); *Krupski v. Costa Crociere*, 130 S. Ct. 1133 (U.S. Jan. 15, 2010) (No. 09-337); *Hertz Corp. v. Friend*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1107); *Ricci v. DeStefano*, 129 S. Ct. 893, 894 (U.S. Jan. 9, 2009) (Nos. 07-1428 & 08-328); *Flores-Figueroa v. United States*, 129 S. Ct. 457 (U.S. Oct. 20, 2008) (No. 08-108); *Melendez-Diaz v. Massachusetts*, 552 U.S. 1256 (U.S. Mar. 17, 2008) (No. 07-591).

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE LAW OF OTHER CIRCUITS

The Fourth Circuit's refusal in this case, as in its en banc *Ocheltree* decision, to consider the egregiousness of discriminatory conduct as relevant evidence supporting a finding of malice or reckless indifference to federal rights directly conflicts with the decisions of other courts of appeals, which have hewed to this Court's direction in *Kolstad* and held that direct evidence of the decisionmaker's knowledge of federal law is not required. In the Second Circuit, "[a] plaintiff may establish the requisite state of mind for an award of punitive damages with evidence (1) that the defendant 'discriminate[d] in the face of a perceived risk that its actions . . . violate[d] federal law,' *or* (2) of 'egregious or outrageous acts' that 'may serve as evidence supporting an inference of the requisite evil motive.'" *United States v. Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005) (alterations and omission in original) (citations and some internal quotation marks omitted). Thus, had this case arisen in the Second Circuit, the damages award would have been affirmed.

The case also would have come out exactly the opposite in the Third Circuit, which has ruled that "recklessness and malice may be inferred when a manager responsible for showing and renting apartments repeatedly refuses to deal with African-Americans about the apartment, and misrepresents the apartment's availability. *Alexander v. Riga*, 208 F.3d 419, 431 (3d Cir. 2000). Likewise, the Eighth Circuit holds that "a reasonable jury could have found Hudson's behavior 'sufficiently abusive' to

manifest the requisite malice or reckless disregard for Ogden's rights." *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000). So too in the First and Ninth Circuits, and apparently the Sixth Circuit as well. *See DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001) ("The extent of federal statutory and constitutional law preventing discrimination on the basis of ethnicity or race suggests that defendants had to know that such discrimination was illegal, and that in misgrading DiMarco's test they exhibited 'reckless and callous indifference' to her federal rights, if not evil intent."); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515-516 (9th Cir. 2000) (evidence that employer took retaliatory actions and engaged in continuing effort to cover up campaign against employee supported punitive damages award); *Jeffries v. Wal-Mart Stores, Inc.*, 15 Fed. App'x 252, 265, 2001 WL 845486, at *9 (6th Cir. 2001) ("[T]he jury could have concluded that Wal-Mart engaged in a pattern of calculated retaliatory conduct so egregious as to be in reckless disregard of Jeffries's right to be free from retaliation.").

Federal prohibitions on race and gender discrimination are national laws enacted by Congress to combat national problems. Their operation should not vary based on geographical boundaries. That a major corporation's high level officers still felt free in 2005-2006 to engage in the type of overt and egregious racially discriminatory conduct aimed at *destroying* a minority-owned business that was displayed in this case underscores that the deterrence of punitive damage awards is needed as much in the Fourth Circuit as in the First, Second, Third, Sixth, Eighth, and Ninth Circuits. The Fourth

Circuit's denial of rehearing en banc, moreover, demonstrates that only this Court's review can restore the needed uniformity in enforcement and deterrence.

The question on which the circuits are in conflict, moreover, is an important and recurring question of law that cuts across multiple federal anti-discrimination laws, as the Fourth Circuit's pattern of rejecting egregious-discrimination evidence documents. That is because the same punitive damages standard governs numerous civil rights statutes, including Title VII and the Americans with Disabilities Act, 42 U.S.C. § 1981a(b)(1), and 42 U.S.C. §§ 1981 and 1983. *See Kolstad*, 527 U.S. at 535-536; *Smith*, 461 U.S. at 56. Tens of thousands of cases are filed under those laws each year in federal court alone. *See* Admin. Office of U.S. Courts, *Federal Judicial Caseload Statistics: March 31, 2009*, App. Table C-2 (2009). Indeed, both this Court's grant of review in *Kolstad* and the breadth of the circuit conflict documents the frequency with which the issue arises and its importance to the day-to-day enforcement of vital civil rights laws. This Court's resolution of the conflict thus warrants certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the judgment should be summarily reversed in light of this Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

Respectfully submitted,

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June 25, 2010

APPENDIX

APPENDIX

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Worldwide Network Services, LLC v. DynCorp International, LLC, No. 08-2108 (4th Cir. Mar. 29, 2010) (order denying rehearing) 1a

Worldwide Network Services, LLC v. DynCorp International, LLC, No. 08-2108 (4th Cir. Feb. 12, 2010) 4a

Worldwide Network Services, LLC v. DynCorp International, LLC, No. 1:07-cv-00627 (E.D. Va. June 19, 2008) 64a

FILED: March 29, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2108 (L)
(1:07-cv-00627-GBL-JFA)

WORLDWIDE NETWORK SERVICES, LLC;
WORLDWIDE NETWORK SERVICES,
INTERNATIONAL, FZCO,

Plaintiffs - Appellees

v.

DYNCORP INTERNATIONAL, LLC,

Defendant - Appellant

CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA,

Amicus Supporting Appellant

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW; THE NATIONAL URBAN LEAGUE,

Amici Supporting Appellee

No. 08-2166
(1:07-cv-00627-GBL-JFA)

WORLDWIDE NETWORK SERVICES, LLC;
WORLDWIDE NETWORK SERVICES,
INTERNATIONAL, FZCO,

Plaintiffs - Appellants

v.

DYNCORP INTERNATIONAL, LLC,

Defendant - Appellee

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW; THE NATIONAL URBAN LEAGUE,

Amici Supporting Appellant

CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA,

Amicus Supporting Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Duncan, and Chief District Judge Jones.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
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No. 08-2108

WORLDWIDE NETWORK SERVICES, LLC; WORLDWIDE NETWORK SERVICES, INTERNATIONAL, FZCO,

Plaintiffs – Appellees,

v.

DYNCORP INTERNATIONAL, LLC,

Defendant – Appellant.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amicus Supporting Appellant,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; THE NATIONAL URBAN LEAGUE,

Amici Supporting Appellees.

No. 08-2166

WORLDWIDE NETWORK SERVICES, LLC; WORLDWIDE NETWORK SERVICES, INTERNATIONAL, FZCO,

Plaintiffs – Appellants,

v.

DYNCORP INTERNATIONAL, LLC,

Defendant – Appellee.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amicus Supporting Appellee,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; THE NATIONAL URBAN LEAGUE,

Amici Supporting Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:07-cv-00627-GBL-JFA)

Argued: September 22, 2009 Decided: February 12, 2010

Before NIEMEYER and DUNCAN, Circuit Judges, and James P. JONES, Chief United States District Judge for the Western District of Virginia, sitting by designation

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Affirmed in part and reversed in part by unpublished opinion. Judge Duncan wrote the majority opinion, in which Judge Niemeyer concurred as to Part II.D(1)&(2), and in which Judge Jones concurred as to Parts II.A, II.B, and II.C. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part. Judge Jones wrote a separate opinion concurring in part and dissenting in part.

ARGUED: Carter Glasgow Phillips, SIDLEY & AUSTIN, LLP, Washington, D.C., for Dyncorp International, LLC. Patricia Ann Millett, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, Washington, D.C., for Worldwide Network Services, LLC, and Worldwide Network Services, International, FZCO. **ON BRIEF**: Eric D. McArthur, SIDLEY & AUSTIN, LLP, Washington, D.C.; George D. Ruttinger, Keith J. Harrison, Clifton S. Elgarten, CROWELL & MORING, LLP, Washington, D.C., for Dyncorp International, LLC. Thomas P. Goldstein, Anthony T. Pierce, Michele A. Roberts, Merrill C. Godfrey, Monica P. Sekhon, Won S. Shin, Michael S.

Bailey, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, Washington, D.C., for Worldwide Network Services, LLC, and Worldwide Network Services, International, FZCO. Charles P. Roberts, III, CONSTAGY, BROOKS & SMITH, LLP, Winston-Salem, North Carolina; Robin S. Conrad, Shane B. Kawka, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C., for Chamber of Commerce of the United States of America, Amicus Supporting Dyncorp International, LLC. Bernard J. DiMuro, Jonathan R. Mook, Michael E. Barnsback, DIMURO GINSBERG, PC, Alexandria, Virginia; John Brittain, Sarah Crawford, Tricia Jefferson, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C., for Lawyers' Committee for Civil Rights Under Law, Amicus Supporting Worldwide Network Services, LLC, and Worldwide Network Services, International, FZCO. Sean A. Lev, Priya R. Aiyar, Kfir B. Levy, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC, Washington, D.C., for The National Urban League, Amicus Supporting Worldwide Network Services, LLC, and Worldwide Network Services, International, FZCO.

Unpublished opinions are not binding precedent in this circuit.

DUNCAN, Circuit Judge:

Worldwide Network Services, Inc. ("WWNS") sued DynCorp International, LLC ("DynCorp") for discrimination under 42 U.S.C. § 1981 and various torts after DynCorp terminated a subcontract with WWNS related to government work in Iraq and Afghanistan. Upon finding DynCorp liable, a jury awarded WWNS $10 million in punitive damages. On appeal, DynCorp challenges three evidentiary rulings, two jury instructions, and the district court's denial of DynCorp's motions under Federal Rule of Civil Procedure 50. For the reasons stated below, we affirm in part and reverse in part, vacating the award of punitive damages.

I.

A.

DynCorp contracted with the United States Department of State to provide services in Iraq and Afghanistan for the Worldwide Personal Protective Services program ("WPPS") and Civilian Police program ("CivPol"). WPPS protects United States personnel and certain foreign officials abroad. CivPol provides law enforcement, criminal justice, and other assistance to societies undergoing post-conflict reconstruction. DynCorp carried out the services through its International Technical Services Division ("ITS Division"). The CivPol Program Manager was Richard Cashon.

In February 2004 DynCorp entered into subcontracts with WWNS to provide communication

and information-technology services for WPPS and CivPol ("WPPS Subcontract" and "CivPol Subcontract"). DynCorp then issued task orders that would expire between August and October 2006.[1] WWNS had been designated a Small Disadvantaged Business by the United States Small Business Administration under the Small Business Act of 1953 § 8(a), 15 U.S.C. § 637(a), because its owners Walter Gray and Reginald Bailey are African American. WWNS was awarded the WPPS and CivPol Subcontracts after well-known entrepreneur Ross Perot introduced Gray and Bailey to Steven Cannon, who was then President and CEO of DynCorp.

B.

The quality of WWNS's work remains unclear. In January 2006 the State Department twice complained about WWNS and threatened to terminate DynCorp as a result. One complaint stated, "WWNS's technical performance has in general been inadequate to the point where it has disrupted critical communications in the field." J.A. 117. Also, DynCorp had previously complained to WWNS about radio failures. Notwithstanding, Cashon gave WWNS glowing evaluations in January and March 2006. His March evaluation deemed WWNS

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[1] Regarding "task orders," see 48 C.F.R. § 16.501-1 ("Task order contract means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.").

After receiving the State Department complaints, DynCorp investigated WWNS's work and generated two internal reports. First, the CivPol Iraq IT Evaluation ("Iraq Report") completed by June 19, 2006, evaluated WWNS's work at the Baghdad Hotel, the CivPol headquarters for Iraq. Second, the Middle East Information Technology Tiger Team Site Assessment Report ("Tiger Report") dated July 22, 2006, evaluated WWNS's work at locations in Afghanistan. The reports' principal author was Christopher Kellogg ("Kellogg"), but other DynCorp employees also contributed. Each report was highly critical of WWNS.

C.

DynCorp's relationship with WWNS began to deteriorate in December 2005 when DynCorp hired new executives in the ITS Division. Robert Rosenkranz became President, Richard Walsh became Vice-President of Operations, Walter Merrick became Deputy CivPol Program Manager, and Leon DeBeer became Information-Technology Manager. With these arrivals, DynCorp began excluding WWNS personnel from planning meetings, ignoring emails from WWNS managers in Iraq, and failing to provide WWNS employees with needed access to worksites and equipment. In particular, DynCorp failed to provide WWNS employees with security badges needed to move around in Iraq.

The tension between DynCorp and WWNS reached breaking point in summer 2006. On July 17, 2006, Cannon resigned as President and CEO of DynCorp. Immediately thereafter, DynCorp decided

not to issue further task orders under the CivPol Subcontract or to renew the subcontract. DynCorp alleges that Cashon was solely responsible for this decision. Cashon's testimony and other evidence, however, indicate that Cashon, Rosenkranz, Merrick, and Walsh made the decision collectively.

Prior to the CivPol Subcontract's expiration, DynCorp engaged in certain questionable behavior toward WWNS. For example, DynCorp had Charles Jones, WWNS's Iraq Country Manager, escorted from his workplace at gunpoint. DynCorp then recruited WWNS's non-managerial employees in Iraq and Afghanistan to join DynCorp or EDO Corporation ("EDO Corp"), the non-minority-owned company that would eventually replace WWNS. Moreover, Walsh directed DynCorp's accounting department to stop processing or paying invoices from WWNS for work already completed.[2] In stopping payment, DynCorp did not provide WWNS with notice or the opportunity to cure alleged deficiencies in the work. Because almost all of WWNS's business came from DynCorp, DynCorp's actions in ending the CivPol Subcontract, recruiting WWNS's employees, and stopping payment on its invoices nearly destroyed WWNS.

D.

Beyond the above questionable behavior, the record contains evidence of DynCorp's racial animus toward WWNS. John Mack, a consultant for DynCorp, testified that Walsh called Gray "a stupid

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[2] In February 2008 DynCorp paid WWNS over $3.3 million for outstanding invoices that dated back two years. It offered no explanation for the delay.

black mother . . . ." J.A. 1723. Also, Rosenkranz terminated DynCorp's only minority executive Richard Spencer, a Latino, who testified to "some underlying discriminatory things" behind his termination. J.A. 1019.

DeBeer in particular expressed racial animus, often calling Gray "nigger" and "kaffir."[3] J.A. 872. According to Jones, DeBeer expressed "[t]wo to three times a week" that "people of Anglo descent . . . had made a grave error" because they "had taken the black man as a youth and attempted to clothe him and send him to school" and that "the proper role of the black man was to go out and kill a lion, proving his manhood, at which point in time he should be put to work to feed his family . . . and mated with a woman so that he would have more children, who could then be put to work feeding their family." J.A. 874. Jones said DeBeer predicted that DynCorp's relationship with WWNS would end and explained that "that ending was being manufactured by . . . factions within DynCorp" that opposed Cannon. J.A. 869. Jones noted that DeBeer was "consumed by . . . hatred" for "Cannon and everybody associated with him." J.A. 873.

Finally, DynCorp celebrated WWNS's demise during a company dinner in October 2006 hosted by Rosenkranz. At the dinner, Walsh received a T-shirt that read, "WWNS - I took them down, and all I got was this lousy T-Shirt." J.A. 1139. After Walsh put on the T-shirt, DynCorp employee Bill Cavanaugh

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[3] The term "kaffir" is "[u]sed especially in southern Africa as a disparaging term for a Black person." American Heritage Dictionary of the English Language 952 (4th ed. 2006).

presented a letter purportedly from Gray to Walsh and read it aloud in mock Ebonics. According to a DynCorp executive, Rosenkranz "was laughing his ass off." J.A. 1029.

E.

In October 2006 WWNS brought this action against DynCorp and EDO Corp in the District of Columbia. The case was later transferred to the Eastern District of Virginia. The complaint asserted claims of discrimination under 42 U.S.C. § 1981 (Count 1); tortious interference with contract (Count 3); tortious interference with prospective economic advantage (Count 4); civil conspiracy (Count 5); conspiracy under the Virginia Conspiracy Act, Va. Code Ann. § 18.2-499 (Count 6); breach of the CivPol Subcontract (Count 7); breach of the WPPS Subcontract (Count 8); and breach of the implied covenant of good faith and fair dealing (Count 9).[4] In turn, DynCorp filed counterclaims of breach of the CivPol Subcontract, breach of the WPPS Subcontract, and breach of warranty. WWNS and DynCorp proceeded to trial by jury in May 2008. WWNS and EDO Corp settled on the eve of trial.

Before trial, DynCorp planned to introduce the Iraq and Tiger Reports into evidence through Kellogg, who would testify about his observations during DynCorp's internal investigation. However, the district court granted WWNS's motion to exclude the testimony, saying the reports contained hearsay. The court also found the reports and Kellogg's proposed testimony inadmissible under Federal Rule

[4] Count 2 was dismissed before trial.

of Evidence 701, which prohibits lay witnesses from giving expert testimony.

During trial, DynCorp objected to Spencer's testimony about his termination by Rosenkranz based on Federal Rules of Evidence 401 and 403.[5] The district court overruled this objection, reasoning that Spencer's testimony was "relevant to the issue of pretext as it demonstrates DynCorp's corporate attitude toward minorities and provides insight into what factors contributed to DynCorp's decision to terminate its relationship with WWNS." J.A. 1891. Later, DynCorp tried to offer rehabilitative testimony from Jasbir Gill, a Sikh employee at DynCorp. The court held, "Well, I'll allow Ms. Gill to testify about her interaction with Mr. DeBeer, and whether or not he used any racial slurs in her presence," but "[h]ow she was treated by the company is irrelevant." J.A. 1568.

Finally, DynCorp objected to the testimony of John Mack. When WWNS called him on rebuttal, Mack testified that Walsh called Gray "a stupid black mother . . . ." J.A. 1723. About ten questions later, DynCorp objected and moved to strike because WWNS had failed to notify DynCorp about Mack's testimony under Federal Rule of Civil Procedure

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[5] Rule 401 defines "relevant evidence" to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Fed. R. Evid. 401. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

26(e), which requires parties to supplement discovery when new evidence surfaces. During a bench conference, WWNS admitted its failure to notify DynCorp pursuant to Rule 26(e). Nonetheless, the court denied DynCorp's motion to strike and instead instructed the jury to take into consideration WWNS's failure to notify DynCorp about Mack's testimony.

Following the close of evidence, the district court granted WWNS's motion under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law regarding unpaid invoices totaling almost $2.8 million. The court then instructed the jury.

Regarding the § 1981 discrimination claim, DynCorp had requested an instruction based on *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004). The proposed instruction stated:

> DynCorp asserts that the person who made the decision not to renew or extend the WWNS CIVPOL subcontract or task orders was not improperly motivated by discrimination. To the extent that WWNS rests its discrimination claim upon the discriminatory motivations of a subordinate employee, WWNS must show by the greater weight of the evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for DynCorp.

J.A. 1185. The district court refused to give this instruction, explaining: "I don't think I need to. I

think you can prove that they [DynCorp] were responsible or not, and the jury doesn't have to specify which person did what." J.A. 1656. Instead, the court instructed: "WWNS must prove that DynCorp intentionally discriminated against WWNS. That is, the race of WWNS's owners must be proven to have been a motivating factor in DynCorp's decision not to renew WWNS's CIVPOL subcontract or issue further task orders thereunder." J.A. 1762.

Regarding punitive damages, the district court gave the following instruction:

> [Y]ou may award punitive damages if WWNS . . . [has] shown by clear and convincing evidence that DynCorp maliciously, or with reckless indifference, discriminated against WWNS, and/or that DynCorp tortiously interfered with the contracts between [WWNS] and its employees, and/or conspired with EDO to interfere with the contracts between [WWNS] and its employees, and/or that DynCorp tortiously interfered with WWNS's prospective economic advantage.

J.A. 1771. By contrast, DynCorp had requested an instruction that began, "WWNS claims the acts of DynCorp were done with malice or reckless indifference *to WWNS's federally protected rights*." J.A. 1186 (emphasis added).

After several days of deliberation, the jury returned a split verdict. It found in DynCorp's favor on Counts 4-6 and one of DynCorp's counterclaims, awarding DynCorp $178,000 for breach of the WPPS

Subcontract. The jury found in WWNS's favor on all other claims. It awarded WWNS compensatory damages of $3.42 million for Count 1 (§ 1981 discrimination), $83,000 for Count 3 (tortious interference with contract), $558,510.42 for Count 7 (breach of CivPol Subcontract), $42,092.62 for Count 8 (breach of WPPS Subcontract), and $720,000 for Count 9 (breach of implied covenant of good faith and fair dealing). The jury also awarded WWNS $10 million in punitive damages.

The district court denied DynCorp's renewed Federal Rule of Civil Procedure 50(b) motion for judgment as a matter of law, Rule 59(a) motion for a new trial, and Rule 59(e) motion to alter or amend the judgment. This appeal followed. We have jurisdiction under 28 U.S.C. §§ 1331 and 1291.[6]

II.

On appeal, DynCorp asserts (1) that the district court should have given DynCorp's proposed jury instruction regarding the § 1981 discrimination claim; (2) that DynCorp should have been awarded judgment as a matter of law on that claim; (3) that Kellogg's testimony and the Iraq and Tiger Reports should have been admitted; (4) that Spencer's testimony should have been excluded; (5) that Mack's testimony should have been struck; (6) that the jury instruction on punitive damages for § 1981

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[6] WWNS filed a cross-appeal, arguing that Alexis Maniatis's proposed testimony calculating WWNS's lost profits was erroneously excluded. Because we do not remand for another trial to determine compensatory damages, we do not reach WWNS's cross-appeal.

discrimination was erroneous; and (7) that the record does not support punitive damages for § 1981 discrimination.[7] We consider each contention below.

A.

We first consider DynCorp's challenge to the district court's failure to give its proposed jury instruction regarding the § 1981 discrimination claim. "A district court commits reversible error in refusing to provide a proffered jury instruction only when the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Passaro*, 577 F.3d 207, 221 (4th Cir. 2009) (internal quotations omitted). "We review the district court's decision to give or refuse to give a jury instruction for abuse of discretion." *Id.* "Moreover, we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *Id.* (internal quotations omitted).

Because DynCorp's proposed instruction regarding the § 1981 claim was based on *Hill*, in reviewing the district court's failure to give that instruction we must consider *Hill*'s applicability to this case. Ethel Hill was a Lockheed mechanic who

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[7] DynCorp also asserts that the award of punitive damages violates the Due Process Clause, but we do not reach this issue because we vacate that award.

repaired aircraft at military bases under contracts between Lockheed and the United States. Her work was overseen by a "lead person" who reported to her supervisor. Lockheed also assigned a safety inspector to each jobsite who reported to the lead person but lacked supervisory authority. Hill received three written reprimands based on errors discovered by her jobsite's safety inspector and was terminated pursuant to company policy. Hill alleged discrimination by that inspector, who had often called her a "damn woman" and "useless old lady" who should retire. *Hill*, 354 F.3d at 283.

Hill sued Lockheed under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"), arguing that but for the inspector's discrimination she would have received fewer reprimands and avoided termination. The district court granted summary judgment to Lockheed on the ground that the inspector's bias could not be imputed to Lockheed. *Hill*, 354 F.3d at 283. In affirming, we announced this rule:

> [T]o survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

Id. at 291 (emphasis added). Accordingly, we found summary judgment appropriate because Hill had not shown evidence that the safety inspector could be considered the actual decisionmaker or the one principally responsible for the decision to terminate Hill. *Id.* at 297-98.

DynCorp argues that the *Hill* rule governs the case now before us. After carefully studying *Hill*, we disagree. In that case, the ultimate question was whether Lockheed intentionally discriminated in deciding to terminate Hill. This required evidence that her "'protected trait . . . actually motivated the employer's decision,'" that is, that the trait "'actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome.'" *Id.* at 286 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000)). Accordingly, we considered "who is a 'decisionmaker' for purposes of discrimination actions brought under Title VII and the ADEA." Hill, 354 F.3d at 286. We said agency principles guided our decision because both statutes defined "employer" to include "any agent" thereof. *Id.* at 287; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-65 (1998). We then noted *Ellerth*, where the Supreme Court explained that "[t]he supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control," and that "tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762. Therefore, the Court said that "a tangible employment action taken by the

supervisor becomes for Title VII purposes the act of the employer." *Id.*

The case most important to our *Hill* decision was *Reeves*. Roger Reeves supervised assembly-line workers for Sanderson Plumbing Products, Inc., which made toilet seats and covers. Upon learning that Reeves made various mistakes, Powe Chestnut, the director of manufacturing and the husband of company president Sandra Sanderson, told Sanderson that Reeves should be fired Sanderson followed his recommendation. Reeves then sued under the ADEA, alleging that his termination resulted from discrimination by Chestnut, who had often showed discriminatory animus toward him. *Reeves*, 530 U.S. at 138. The Supreme Court found that Reeves had overcome judgment notwithstanding the verdict because, although Sanderson "made the formal decision to discharge" Reeves, Chestnut "was principally responsible for" and "the actual decisionmaker behind his firing." *Id.* at 151-52. Reeves had produced evidence that Chestnut "exercised 'absolute power' within the company." *Id.* at 152.

Ultimately, *Reeves*'s rationale dictated the rule that *Hill* announced. *See Hill*, 354 F.3d at 288-89 ("*Reeves* informs us that the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer for an adverse employment action, so long as . . . the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." (quoting *Reeves*, 530 U.S. at 151-52)). For our purposes, *Reeves* also clarifies the *Hill* rule.

Reeves distinguishes between the "formal decisionmaker," which under *Ellerth* would be the person authorized to make the relevant decision, and "subordinate" employees who lack this authority, such as Chestnut or the safety inspector in *Hill*. Accordingly, we believe the term "subordinate employee" in the *Hill* rule invokes that distinction. *Hill*, 354 F.3d at 291.

Using this interpretation, and assuming for purposes of this appeal that *Hill* applies under § 1981, we conclude that DynCorp can take no comfort from *Hill* on the facts before us. DynCorp relies on *Hill* to argue that, because it alleges that Cashon was solely responsible for the decision to terminate the CivPol Subcontract, the jury should not have been allowed to consider the racial animus of anyone other than Cashon. We note, however, that *Hill* does not enable DynCorp to self-select the decisionmaker whose motives are the purest. Furthermore, we find *Hill* inapplicable for two separate reasons.

First, the *Hill* rule's initial premise, namely, that the plaintiff "rests a discrimination claim . . . upon the discriminatory motivations of a subordinate employee," assumes that a formal decisionmaker can be identified. *Id.* at 291. In this case, however, WWNS and DynCorp offered conflicting evidence regarding who had authority to terminate the CivPol Subcontract. Cashon testified to having this authority but also admitted that he answered to Rosenkranz regarding his decision. Moreover, other evidence indicated that Cashon, Merrick, Rosenkranz, and Walsh were authorized to make that decision collectively. Significantly, Walsh was the

one who directed DynCorp's accounting department to stop payment to WWNS for completed work. By contrast, this problem of identification was absent from *Hill* and *Reeves*, where none debated who had formal decisionmaking authority.

Second, even assuming that only Cashon could be considered the formal decisionmaker, we are unwilling to conclude that Walsh and Rosenkranz, who supervised Cashon, should be treated like the *Hill* and *Reeves* subordinate employees who lacked authority over the formal decisionmaker. Because *Hill* thus does not apply to this case, we conclude that the district court's refusal to give DynCorp's proposed instruction was not an abuse of discretion.[8]

B.

Next, we consider DynCorp's challenge to the district court's denial of DynCorp's renewed Rule 50(b) motion for judgment as a matter of law on the § 1981 claim. "We review de novo the grant or denial of a motion for judgment as a matter of law." *Robinson v. Equifax Info. Servs, LLC*, 560 F.3d 235, 240 (4th

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[8] We note as well that DynCorp's proposed jury instruction was "substantially covered by the court's charge to the jury." Passaro, 577 F.3d at 221. As mentioned, the district court instructed that "the race of WWNS's owners must be proven to have been a motivating factor in DynCorp's decision not to renew WWNS's CIVPOL subcontract or issue further task orders thereunder." J.A. 1762. Following this instruction's clear import, the jury could not have considered evidence of racial bias regarding DynCorp employees that neither made nor had authority to make that decision. Thus, DynCorp's proposed instruction differed from the actual one only by wrongly insinuating that just one person could have made or been responsible for the decision to terminate the CivPol Subcontract.

Cir. 2009) (internal quotations omitted). "Judgment as a matter of law is proper when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 305 (4th Cir. 2009) (internal quotations omitted); *see also Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008) ("A court may award judgment as a matter of law only if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party."). On this issue, we must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002).

In this case, § 1981 liability required proof that race actually motivated DynCorp's decision to terminate the CivPol Subcontract, that is, that race "actually played a role in the . . . decisionmaking process and had a determinative influence on the outcome." *Reeves*, 530 U.S. at 141. DynCorp alleges that only Cashon made the decision to terminate the CivPol Subcontract. Accordingly, DynCorp concludes that all other DynCorp executives' alleged racial animus must be ignored under Hill. In that light, DynCorp asserts that the verdict cannot stand. We disagree with the initial premise that only Cashon made the decision.[9] The record contains sufficient

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[9] We do not dispute the characterization in Judge Niemeyer's opinion, dissenting in part, that Cashon had authority to terminate the CivPol Subcontract. However, that opinion fails to reckon with Cashon's own testimony that he made the decision collectively with Merrick, Rosenkranz, and

evidence from which a reasonable jury could conclude that Cashon, Rosenkranz, Merrick, and Walsh made a collective decision to terminate the CivPol Subcontract. The record also contains evidence that Rosenkranz and Walsh harbored racial animus against Gray and Bailey. This evidence includes Walsh's racial slur, Spencer's termination by Rosenkranz, Walsh stopping payments to WWNS, and the checkered October 2006 dinner celebrating WWNS's misfortune.[10] Therefore, sufficient evidence of discrimination was presented for § 1981 liability.

Moreover, we note that WWNS presented adequate evidence to establish § 1981 liability through the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (extending *McDonnell Douglas* to § 1981 cases), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Under this analysis, the plaintiff carries an initial burden to establish a prima facie case of discrimination. A company alleging discriminatory contract termination may carry this burden by showing that (1) the defendant terminated a contract with it, (2) it was within a protected class, (3) its performance under the contract met the defendant's legitimate expectations, and (4) the

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Walsh – the discriminatory animus of at least Rosenkranz and Walsh having been set out.

[10] To the extent that Judge Niemeyer's opinion argues that, but for evidence about DeBeer, the record contained insufficient evidence to establish § 1981 discrimination, we note that that opinion fails to account for Walsh's otherwise unexplained decision to stop payments to WWNS.

defendant instead contracted with a company not in a protected class. *See Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007). Once the prima facie case has been established, the burden shifts to the defendant "to articulate a legitimate, nondiscriminatory reason" for the contract termination. *Id.* (internal quotations omitted). Once the defendant carries this burden of production, the burden shifts back to the plaintiff to prove that the defendant's stated reasons "were not its true reasons, but were a pretext for discrimination." *Id.* (internal quotations omitted). At this point, "the *McDonnell Douglas* framework – with its presumptions and burdens – disappear[s] . . . and the sole remaining issue [i]s discrimination vel non." *Reeves*, 530 U.S. at 142-43 (internal quotations omitted).

WWNS established a prima facie case of discrimination by showing that (1) DynCorp terminated the CivPol Subcontract, (2) WWNS had been designated a Small Disadvantaged Business by the SBA because Gray and Bailey are African American, (3) Cashon's glowing evaluations of WWNS in January and March 2006 rated WWNS "excellent" or "good" across the board and stated that DynCorp would hire WWNS again, and (4) EDO Corp. was not minority-owned. In turn, DynCorp articulated a legitimate, nondiscriminatory reason for terminating the CivPol Subcontract. Cashon testified that the reason was WWNS's poor performance. We believe a reasonable jury could have concluded that DynCorp's stated reason was merely a pretext for discrimination. For example, the jury might have disbelieved Cashon's testimony about DynCorp's stated reason because Cashon himself had given

WWNS glowing evaluations. Therefore, we affirm the district court's denial of DynCorp's Rule 50(b) motion regarding the § 1981 claim.

C.

We next consider three evidentiary rulings that DynCorp challenges. We review each for abuse of discretion. *United States v. Basham*, 561 F.3d 302, 325 (4th Cir. 2009).

1.

First, DynCorp argues that the district court committed reversible error by excluding Kellogg's testimony and the Iraq and Tiger Reports. This evidence was excluded under Federal Rule of Evidence 701, which "forbids the admission of expert testimony dressed in lay witness clothing." *United States v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006). Kellogg's excluded testimony and the Iraq and Tiger Reports were technical evaluations of WWNS's performance. Discussed topics include whether WWNS's chosen method of encrypting wireless communication provided enough security. We believe such matters are well beyond the scope of permissible lay testimony under Rule 701. *See Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (noting that Rule 701 "generally does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness" (internal quotations omitted)). Therefore, we conclude that the district court's decision to exclude that evidence was not an abuse of discretion.

2.

Second, DynCorp challenges the district court's failure to exclude Spencer's testimony about his termination by Rosenkranz under Federal Rules of Evidence 401 and 403. The court below reasoned that Spencer's testimony was "relevant to the issue of pretext as it demonstrates DynCorp's corporate attitude toward minorities and provides insight into what factors contributed to DynCorp's decision to terminate its relationship with WWNS." J.A. 1891. We believe that Spencer's testimony was indeed relevant because of Rosenkranz's apparent participation in DynCorp's decision to terminate the CivPol Subcontract. Moreover, we believe this probative value outweighed any danger of undue prejudice. Thus, we affirm the district court's decision to allow Spencer's testimony.

3.

Finally, DynCorp challenges the district court's failure to strike Mack's testimony that Walsh called Gray "a stupid black mother . . . ." J.A. 1723. Federal Rule of Civil Procedure 26(e) provides that a party who has made a disclosure or responded to an interrogatory "must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). Mack's allegation became known to WWNS several days before trial, but DynCorp was not made aware of it until Mack testified at trial. WWNS thus clearly violated Rule 26(e), which it does not dispute.

Upon discovering that WWNS had not disclosed Mack's allegation, DynCorp objected and moved to strike because of WWNS's Rule 26(e) violation. The district court denied this motion, stating: "[T]he difficulty that I have is, you're asking me to tell the jury to disregard the hot poker that has just been put in front of their face. I don't think I can undo it that way." J.A. 1730. Instead, the court instructed the jury to take into consideration WWNS's failure to notify DynCorp about Mack's allegation. DynCorp later moved for a new trial, arguing that Mack's testimony should have been struck, but the court denied this motion.

Federal Rule of Civil Procedure 37(c)(1) provides: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). WWNS asserts that the Rule 26 violation was harmless but concedes that no substantial justification existed.

We have said that a court determining harmlessness under Rule 37(c)(1) should consider five factors:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's

explanation for its failure to disclose the evidence.

S. States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003). Based on these factors, we believe WWNS's Rule 26 violation was indeed harmless. Although DynCorp was surprised by Mack's testimony, the trial continued undisturbed. Moreover, the record contains abundant evidence of racial animus aside from Mack's testimony. This includes Spencer's termination by Rosenkranz, the racially charged October 2006 dinner celebrating WWNS's misfortune, and Walsh directing DynCorp's accounting department to stop paying WWNS for work already completed. We therefore decline to reverse on this ground.

D.

Finally, we consider alleged errors regarding the $10 million punitive-damages award. DynCorp argues that punitive damages for the § 1981 claim are unsupported by the record and that the jury instruction on that issue was erroneous.

1.

We begin by considering the district court's denial of DynCorp's renewed Rule 50(b) motion for judgment as a matter of law with regard to WWNS's prayer for punitive damages for the § 1981 claim. We review this decision de novo. *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 442-43 (4th Cir. 2000).

A plaintiff who prevails under § 1981 "is entitled under the common law to punitive damages . . . for conduct . . . exhibiting malice, an evil motive, or recklessness or callous indifference to a federally protected right." *Id.* at 441 (internal quotations omitted). The Supreme Court developed this standard in *Smith v. Wade*, 461 U.S. 30 (1983), for actions under 42 U.S.C. § 1983. Congress later adopted the standard in the Civil Rights Act of 1991, which allows punitive damages in Title VII actions where the employer discriminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Interpreting this statute, the Supreme Court held that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). Accordingly, the Court held that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. Because § 1981a was intended to mirror *Smith*, we have held that "any case law construing the punitive damages standard set forth in § 1981a, for example *Kolstad*, is equally applicable to clarify the common law punitive damages standard with respect to a § 1981 claim." *Lowery*, 206 F.3d at 441. Therefore, upon reviewing § 1981 punitive damages, we have required evidence that the defendant acted "in the face of a perceived risk that [its] decision would violate federal law." *Id.* at 443.

Regarding this requirement, *Kolstad* noted hypotheticals that are particularly relevant to the case before us. The Supreme Court explained:

> There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized.

Kolstad, 527 U.S. at 536-37. Accordingly, even a defendant who discriminates while intending to cause injury might escape liability for punitive damages under § 1981 if he thought his conduct was lawful. This informs our remark that punitive damages are "an extraordinary remedy" and "not every lawsuit under section 1981 calls for submission of this extraordinary remedy to a jury." *Stephens v. S. Atl. Canners, Inc.*, 848 F.2d 484, 489-90 (4th Cir. 1988).

Soon after *Kolstad*, we reviewed a § 1981 punitive-damages award in *Lowery*. Renee Lowery and Lisa Peterson alleged that Circuit City Stores, Inc. ("Circuit City") failed to promote them because of racial animus. Circuit City was found liable under Title VII and § 1981, and the jury awarded punitive damages of $225,000. On appeal, Circuit City asserted that the record did not support punitive damages. Notably, we found punitive damages

recoverable only under § 1981 and limited our analysis accordingly. *Lowery*, 206 F.3d at 441.

We explained, "*Kolstad* teaches that we . . . must first ask whether the record contains sufficient evidence for a reasonable juror to find that in intentionally refusing to promote the plaintiff . . . the decision maker did so in the face of a perceived risk that her decision would violate federal law." *Id.* at 443. We continued, "If the answer is no, we should vacate the portion of the judgment awarding the plaintiff punitive damages and direct entry of judgment as a matter of law in favor of Circuit City on that issue." *Id.* In the end, we found that the record did contain sufficient evidence because Circuit City had presented "evidence that it required every person in management to attend a week-long training seminar that included education on the federal anti-discrimination laws." *Id.* (citing *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1246 (10th Cir. 1999) (finding sufficient evidence where the offending manager "testified that he was familiar with the accommodation requirements of the ADA and its prohibition against discrimination and retaliation in the workplace")).

We considered the same legal issue in subsequent cases. Sufficient evidence was found where a supervisor who engaged in sexual harassment "testified that he had seen an EEOC poster regarding sexual harassment" at work that read, "Sexual harassment is unlawful and unacceptable in the workplace." *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002). Although the supervisor denied reading the poster, we found that "a reasonable jury

could nevertheless infer that [his] awareness of the poster suggested at least a rudimentary knowledge of its import." *Id.* Sufficient evidence was also found where a manager "was specifically aware of FedEx's internal ADA compliance policy, and had received training from FedEx on the ADA's compliance requirements." *E.E.O.C. v. Fed. Express Corp.*, 513 F.3d 360, 373 (4th Cir. 2008).

By contrast, we declined to find sufficient evidence in *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc). Lisa Ocheltree sued her employer Scollon Productions, Inc., under Title VII because she "was the victim of severe or pervasive sex-based harassment in her workplace." *Id.* at 327. We "combed the record," however, and found "no evidence that would allow a jury to find that Scollon Productions knew, either directly or by imputation, that it might have been acting in violation of Ocheltree's 'federally protected rights.'" *Id.* at 336. Thus, we upheld the verdict on liability but vacated punitive damages. *Id.*

The case before us presents a scenario comparable to *Ocheltree*. WWNS has been unable to cite any evidence that DynCorp terminated the CivPol Subcontract "in the face of a perceived risk that [its] decision would violate federal law."[11] *Lowery*, 206 F.3d at 443. The district court likewise

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[11] WWNS cites only 41 C.F.R. § 60-1.4, which requires government contractors to adopt contractual language that pertains to discrimination against employees or applicants for employment under Title VII. However, the language nowhere mentions discrimination against minority-owned corporate subcontractors under § 1981.

failed to cite such evidence, and we could find none upon combing the record.[12] Accordingly, we conclude that the award of punitive damages should be vacated.[13]

2.

Even aside from the above error, the award of punitive damages could not stand because the district court's jury instruction on punitive damages was also

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[12] Judge Jones's opinion, dissenting in part, states that WWNS's July 26, 2006, letter to DynCorp indicates that DynCorp was warned about WWNS's federal right under § 1981. The letter itself, however, shows that this warning came after DynCorp had already terminated the CivPol Subcontract. The letter demands that DynCorp "comply with its obligations under the terms of the February 16, 2004, Subcontract and related Task Orders (collectively 'the Agreements')," but makes clear that DynCorp had already repudiated them. The letter states that "DynCorp has taken it upon itself to inform . . . WWNS employees . . . that the Agreements have been terminated," and that WWNS "consider[ed] DynCorp's conduct to constitute . . . a material breach of the Agreements." J.A. 2692. Because WWNS sent the letter after DynCorp had already terminated the CivPol Subcontract, the letter tells nothing about whether DynCorp previously acted "in the face of a perceived risk that [its] decision would violate federal law." *Lowery*, 206 F.3d at 443.

[13] Added to our rationale, DynCorp argues that the legal theory WWNS advanced was "novel or otherwise poorly recognized," *Kolstad*, 527 U.S. at 537, because whether a corporation may sue under § 1981 was never crystal clear. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 n.1 (2006) (noting that "we have no occasion to determine whether, as a corporation, it could have brought suit under § 1981" (emphasis omitted)); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977) (holding that "a corporation . . . has no racial identity and cannot be the direct target of . . . discrimination").

erroneous. "Instructions are adequate if construed as a whole, and in light of the whole record, they adequately inform the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 530 (4th Cir. 2002) (internal quotations omitted). "Even if instructions are flawed, there can be no reversal unless the error seriously prejudiced the challenging party's case." *Id.* (internal quotations omitted). Because DynCorp's objection to the district court's instruction on punitive damages was not preserved according to Federal Rule of Civil Procedure 51(d)(1), reversal would be proper "only when we can conclude that [the] particular jury instruction must necessarily have caused the jury to act in complete ignorance of, or to have misapplied, fundamentally controlling legal principles to the inevitable prejudice of an aggrieved party." *Spell v. McDaniel*, 824 F.2d 1380, 1399 (4th Cir. 1987); *see also* Fed. R. Civ. P. 51(d)(2).

In this case, the district court gave the following instruction: "[Y]ou may award punitive damages if WWNS . . . [has] shown by clear and convincing evidence that DynCorp maliciously, or with reckless indifference, discriminated against WWNS." J.A. 1771. Notably, the court never defined "malice" or specified to what "reckless indifference" refers. The word "malice" ordinarily means: "A desire to harm others or to see others suffer; extreme ill will or spite." *American Heritage Dictionary of the English Language* 1059 (4th ed. 2006). Unless properly instructed, a layperson would not know that "malice" also has a technical legal meaning relating to awareness that one may be breaking the law. *Cf.*

Perry v. McCaughtry, 308 F.3d 682, 694 (7th Cir. 2002) (Posner, J., dissenting) (arguing that a layperson would not without instruction know that "cause" had the technical meaning "substantial factor in"). Nor would a layperson assume that "reckless indifference" in the instruction specifically means "reckless indifference to federally protected rights." Accordingly, the jury could not have known that "'malice' or 'reckless indifference' pertain to [DynCorp's] knowledge that it may be acting in violation of federal law," *Kolstad*, 527 U.S. at 535, or that punitive damages are improper unless DynCorp acted "in the face of a perceived risk that [its] decision would violate federal law," *Lowery*, 206 F.3d at 443. Therefore, we believe the challenged instruction "caused the jury to act in complete ignorance of . . . fundamentally controlling legal principles." *Spell*, 824 F.2d at 1399.

Regarding whether DynCorp was prejudiced by the instruction, we note again that WWNS has not identified any evidence that DynCorp suspected that terminating the CivPol Subcontract might violate federal law, and we found no such evidence in the record. Notwithstanding, the jury awarded $10 million of punitive damages, which the district court concluded was "for DynCorp's Section 1981 violation." J.A. 1911. Therefore, we believe serious prejudice necessarily resulted from the challenged instruction.

3.

Although the punitive-damages award based on the § 1981 claim should be vacated, the jury's verdict complicates our disposition. The district court

instructed that punitive damages may be awarded on Counts 1 and 3-5. Among this group, DynCorp was found liable only on Count 1 (§ 1981 discrimination) and Count 3 (tortious interference with contract). The jury awarded $10 million of punitive damages, but the verdict does not specify how much was allocable to Count 1 rather than Count 3. For this reason, we cannot vacate the award without unwittingly vacating any punitive damages allocable to Count 3. Accordingly, the case must be remanded for retrial on punitive damages for Count 3.[14]

III.

For the reasons stated above, we affirm the district court's refusal to give DynCorp's proposed jury instruction pertaining to *Hill*, the court's denial of DynCorp's Rule 50(b) motion regarding the § 1981 claim, and all evidentiary rulings challenged by DynCorp. However, we reverse the court's denial of DynCorp's Rule 50(b) motion regarding WWNS's prayer for punitive damages based on the § 1981 claim, vacate the award of punitive damages, and remand the case for retrial on punitive damages for Count 3. Accordingly, we

AFFIRM IN PART AND REVERSE IN PART.

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[14] Any reconsideration should take into account the standard for awarding punitive damages under Virginia law.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

After DynCorp International, LLC refused to renew its subcontract with Worldwide Network Services, LLC for information-technology services, Worldwide Services commenced this action, alleging that DynCorp's termination of the subcontract was motivated by racial animus and thus constituted racial discrimination in contracting, in violation of 42 U.S.C. § 1981. The subcontract had been entered into to assist DynCorp's performance of its contract with the State Department to support civilian police programs in Iraq and Afghanistan.

DynCorp maintained that it terminated its relationship with Worldwide Services because of Worldwide Services' poor performance and that the conceded racial animus of a mid-level manager, who lacked authority to end the relationship, was not imputable to the corporation under *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc) (holding that an employer will not be liable under Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act of 1967 ("ADEA") "for the improperly motivated person *who merely influences* the decision, but [only] for the person[s] *who in reality make[]* the decision" (emphasis added)). The district court refused DynCorp's request to apply Hill to this case and declined to give an instruction to the jury that would have barred imputation of the mid-level manager's racial animus to the corporation for purposes of determining liability under § 1981. The court stated, "[T]he jury doesn't have to specify which person did

what." The jury was thus allowed to consider the racial animus of individuals, including the mid-level manager, who may have influenced those who made the decision on behalf of DynCorp, but who were not themselves decisionmakers, in violation of *Hill*.

The majority approves this error by concluding that *Hill* does not apply to this case because some of the other DynCorp employees alleged to have acted with racial animus were high-level executives who may have had authority to decide not to renew Worldwide Services' subcontract, whereas *Hill* applies when the plaintiff's claim "rests . . . upon the discriminatory motivations of a subordinate employee." *Hill*, 354 F.3d at 291. What this reasoning overlooks, I respectfully submit, is the extent to which Worldwide Services' claim was based on the conceded racial animus of the mid-level manager, who clearly lacked authority to end the relationship between the two companies, but who was in a position to influence the decision to such an extent that the jury may have found that his racial bias was "a motivating factor in DynCorp's decision," which was all the district court required the jury to find before imposing liability on the corporation. Because Worldwide Services presented considerable evidence of this mid-level manager's racial bias and his role in the deterioration of the companies' relationship, the jury needed to be told that only the racial animus of DynCorp's actual decisionmakers could be considered in determining whether race motivated the *corporation's* decision.

Because *Hill* applies to determine when the racial animus of an employee is imputable to a corporation,

it was error for the district court to have refused to give an instruction under *Hill*. And because, in this case, the mid-level manager with racial animus may, as a factual matter, have substantially influenced the decision not to renew Worldwide Services' subcontract, the error was prejudicial. Accordingly, I believe that a new trial is necessary to permit the jury to resolve who DynCorp's decisionmaker or decisionmakers were and whether *they* were actually motivated by racial animus in deciding not to renew Worldwide Services' subcontract. Because I would grant DynCorp's request for a new trial, I would not reach the other issues addressed by the majority, with one exception. In view of the majority's determination to affirm on liability and to provide Judge Duncan with a majority on her discussion of punitive damages, I join her discussion of punitive damages, as contained in Parts II(D)(1) and (2).

I.

In February 2004, the ITS (International Technical Services) Division of DynCorp won a contract from the State Department to provide support for civilian police ("CIVPOL") programs in Iraq and Afghanistan. Thereafter, DynCorp awarded a subcontract to Worldwide Services to perform communication and information-technology services for the CIVPOL program pursuant to "task orders" issued by DynCorp. The subcontract's term extended one year (February 2004 to February 2005) and was renewable under four one-year options. DynCorp renewed the subcontract in February 2005 and again in February 2006, but not thereafter.

Worldwide Services was headed by Walter Gray and Reginald Bailey, both African Americans, and the company was certified by the Small Business Administration as a Section 8(a) disadvantaged company. Before its subcontract with DynCorp, Worldwide Services' annual revenue was about $100,000, which was produced primarily by providing information-technology services to local businesses. During the first year of its subcontract with DynCorp, however, Worldwide Services received over $20 million in revenues.

Richard Cashon, a DynCorp vice president and its program manager for the CIVPOL program, was charged with formally evaluating Worldwide Services' performance under the subcontract, and he gave it positive marks. In January 2006, Cashon rated Worldwide Services' performance as "exceptional" and "very good," noting Worldwide Services' "technical depth in terms of the number of technically competent individuals on their staff" and "flexib[ility] in terms of operating in a dynamic environment." Cashon wrote that he would have no reservations about using Worldwide Services in the future. A few months later, Cashon again rated Worldwide Services' work as "good" or "excellent" in every category and again stated that DynCorp "[w]ould . . . hire this contractor again."

Despite Cashon's positive evaluations, in early 2006 DynCorp received two letters from the State Department criticizing both DynCorp and Worldwide Services' performance. In the first letter, the Principal Deputy Assistant Secretary for the State Department's Bureau of International Narcotics and

Law Enforcement Affairs wrote a letter to DynCorp's CEO to complain about a number of defects in DynCorp's performance, including its supervision of Worldwide Services. The letter stated that "[Worldwide Services'] technical performance has in general been inadequate to the point where it has disrupted critical communications in the field." The letter also made clear that DynCorp's relationship with the State Department could be jeopardized if the problems were not resolved.

About three weeks later, a State Department representative in Baghdad sent a second letter to DynCorp that focused exclusively on the services provided by Worldwide Services in Iraq, and this letter was even more critical of Worldwide Services' performance. It concluded that "[a] great deal must be accomplished to improve many aspects of [Worldwide Services'] service provision, levels of expertise, project management and implementation strategies to effect acceptable standards of IT/communications support."

After receiving these letters, DynCorp developed a plan to manage Worldwide Services more actively. Bob Rosenkranz, the President of DynCorp's ITS Division, designated Richard Walsh, the Vice President for Operations, to serve as a "mentor" to help Worldwide Services improve its performance. Walsh began by having weekly meetings with Worldwide Services' executives Gray and Bailey, and in the first meeting Walsh emphasized that Worldwide Services was "in danger of losing [DynCorp's] business altogether" if its performance did not improve. In February 2006, Walsh traveled

to Afghanistan to observe Worldwide Services' performance on the ground and, as Walsh later testified, he found "[t]he situation . . . much worse than I had thought" and observed that "the basics were not being taken care of.". Walsh was particularly concerned that those traveling into hostile areas were at greater risk because the high-frequency radio network, for which Worldwide Services had responsibility, was not working properly.

When Walsh shared his observations with Rosenkranz, Rosenkranz expressed hope that DynCorp could still "whip [Worldwide Services] into shape." Rosenkranz also described Worldwide Services as "one of the favored ones," suggesting that he shared Walsh's view that Worldwide Services received "protection" from Steve Cannon, DynCorp's CEO and the DynCorp executive most responsible for DynCorp's relationship with Worldwide Services.

In addition to Walsh's efforts, DynCorp also conducted internal investigations into Worldwide Services' performance in both Iraq and Afghanistan, and DynCorp's management received separate reports from these investigations. The report from Iraq, completed by June 19, 2006, noted that the "concern regarding the status of IT and the [Worldwide Services] team that provides that service to [DynCorp] is well-founded." But it also noted that "recent efforts by the [Worldwide Services] team to improve the situation are typically reaching positive results" and that "[t]he current situation is a contrast from what is typically perceived as a rather negative history." The report from Afghanistan, completed

between July 22-31, 2006, found that "the CIVPOL Afghanistan program suffers from a serious IT and [c]ommunications problem that is resulting in reduced program efficiency and effectiveness."

DynCorp's relationship with Worldwide Services suffered an additional serious blow when DynCorp received a third letter from the State Department – this time from the contracting officer overseeing the CIVPOL contract – complaining about Worldwide Services' performance. This letter, dated June 23, 2006, emphasized the State Department's "concern[s] about pervasive information technology (IT) performance deficiencies on all DynCorp Task Orders." After describing a number of specific issues, the letter concluded by requesting a meeting "to discuss this broad spectrum of information technology deficiencies," noting that "[t]he varied nature of these problems and their pervasiveness suggests that they are systemic." Shortly after DynCorp received this letter, its Board of Directors held a meeting, at which Cannon was questioned about the State Department's complaints. Cannon responded that "it might become necessary to replace the subcontractor in question." Four days later, however, Cannon resigned as President and CEO of DynCorp.

Cashon, the program manager, then decided not to issue any additional CIVPOL task orders to Worldwide Services in Iraq. While it was typical for the program manager to make such decisions, in this case there was evidence that Rosenkranz and Walsh participated in the decision. During the last week of July, Cashon also decided to allow all remaining

CIVPOL task orders directed to Worldwide Services to expire and not to renew DynCorp's subcontract with Worldwide Services.

Worldwide Services commenced this action alleging, among other things, that DynCorp's decision not to issue further task orders and not to renew its CIVPOL subcontract was the product of intentional racial discrimination, in violation of 42 U.S.C. § 1981. At trial, Worldwide Services presented five items of direct evidence to demonstrate racial animus.

First, Charles Jones, Worldwide Services' Deputy Program Manager in Iraq from March 2006 to August 2006, testified about racially offensive statements made by Leon DeBeer, DynCorp's Iraq IT Manager and the DynCorp employee to whom Worldwide Services' employees reported in Iraq. Specifically, Jones testified that in private conversations, DeBeer, a white South African, regularly referred to Worldwide Services' Walter Gray as a "nigger," a "bush native," and a "kaffir." He also testified that DeBeer regularly complained that white people "had made a grave error" by "tak[ing] the black man as a youth and attempt[ing] to clothe him and send him to school" because "the proper role of the black man was to go out and kill a lion, proving his manhood, at which point in time he should be put to work to feed his family" and "be mated with a woman so that he would have more children, who could then be put to work feeding the family."

Second, Jones testified that while he was in Iraq, he heard Mike Kehoe, DynCorp's Deputy Program Manager in Iraq for another State Department

contract, describe the acronym for Worldwide Network Services, "WWNS," as standing for "where white men never stay."

Third, John Mack, a part owner of Worldwide Services, testified that he once heard Walsh refer to Gray as "a stupid black mother –."

Fourth, Richard Spencer, a former DynCorp executive in the ITS Division who is Hispanic, testified about the lack of racial diversity among DynCorp's ITS executives and about his belief that his ethnicity played a role in the termination of his own employment.*

Finally, Spencer also testified about a dinner he attended in October 2006 for all of Rosenkranz's direct subordinates and their guests – approximately 40 persons – at which Bill Cavanaugh, DynCorp's Vice President for Business Development, presented Walsh with a shirt that said, "WWNS – I took them down, and all I got was this lousy T-shirt." Cavanaugh then proceeded to read a series of fictitious letters, the last of which purported to be

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* The majority attributes Spencer's termination to Rosenkranz and repeatedly refers to it as evidence of Rosenkranz's racial animus. But Spencer testified that while Rosenkranz signed his termination letter, Spencer had a "fairly good" relationship with Rosenkranz, who is "not a bad guy." Spencer instead suggested that his termination was the decision of Herb Lanese, DynCorp's CEO at the time, who did not like Spencer "for whatever reason." Moreover, Spencer did not attribute any racial motivation to Rosenkranz in signing the letter. Considered in its full context, Spencer's testimony about his termination should not be used to impute racial animus to Rosenkranz.

from Gray. According to Spencer, Cavanaugh read the letter, "mak[ing] a bad impression of Walter" by talking like "the character on Fat Albert" and using "his interpretation of Ebonics." Spencer testified that everybody laughed and that specifically Rosenkranz "was laughing his ass off" and Walsh was "laughing, happy."

Recognizing that the evidence most strongly described racial animus of DeBeer, DynCorp requested a jury instruction from the district court, based on Hill, limiting those employees whose racial animus would be imputable to the corporation. Its requested instruction provided in part:

> To the extent that [Worldwide Services] rests its discrimination claim upon the discriminatory motivations of a subordinate employee, [Worldwide Services] must show by the greater weight of the evidence that the subordinate employee possessed such authority to be viewed as the one principally responsible for the decision or the actual decisionmaker for DynCorp.

The district court refused to give the instruction, justifying its refusal by making a distinction between this case and *Hill*. The court noted that the *Hill* opinion was limited to employer liability under Title VII and the ADEA, whereas this case involves liability under § 1981. The court stated, "Plaintiffs pursuing claims under Title VII or the ADEA are subject to stricter scrutiny than those pursuing claims under Section 1981 because Title VII and ADEA actions must first proceed through the EEOC

process." The court noted that our decision in *Hill* has "never been extended beyond claims brought under Title VII and the ADEA," and it "decline[d] to be the first court to expressly do so." The court concluded that "the Hill standard is not a correct statement of law for claims brought under 42 U.S.C. § 1981."

Rather than limit DynCorp's discrimination liability under § 1981 to the standard stated in *Hill*, the district court instructed the jury that the "race of [Worldwide Services'] owners . . . must have been *a factor that actually led to the decision* . . . not to renew or extend [Worldwide Services'] CIVPOL subcontract or task orders." (Emphasis added).

The jury found that DynCorp's decision not to renew or extend Worldwide Services' CIVPOL subcontract or task orders was based in part on racial animus imputed to the corporation, and it returned a verdict in favor of Worldwide Services on its § 1981 claim, awarding it $3.42 million in compensatory damages and $10 million in punitive damages. From the judgment entered on the jury's verdict, DynCorp filed this appeal.

II.

DynCorp's decision not to renew its subcontract with Worldwide Services was a *corporate* decision, and the corporation's management testified that the corporate decision was made by executives whose motive for ending the relationship with Worldwide Services was only business oriented – based on Worldwide Services' poor performance, as graphically demonstrated by the three letters of complaint from

the State Department – and not for any reason of race.

Worldwide Services alleges that race was a motivating factor, and the vast bulk of its direct evidence of racial animus bore on DeBeer, the IT Manager in Iraq.

As a middle manager, DeBeer's views about Worldwide Services' performance were influential in that Cashon listened to executives both below and above him. But DeBeer was not the decisionmaker or even one of several possible decisionmakers. *Everyone at DynCorp testified that the person who had the authority to make the decision not to renew Worldwide Services' subcontract was Cashon*, the manager for the CIVPOL program, who concededly did not have any racial animus toward Worldwide Services. Indeed, he was a strong supporter of the firm until evidence started coming in about its deficiencies. There was also testimony that two other DynCorp executives, Rosenkranz and Walsh, participated in the decision. While there was some evidence of racial animus imputable to them, it was much weaker and more isolated than that imputed to DeBeer. Specifically, testimony showed that Rosenkranz and Walsh laughed at racial jokes directed at Worldwide Services told at a dinner and that Walsh once make a racial slur about Worldwide Services' Walter Gray.

In short, without the racial animus of DeBeer, no one can predict how the jury might have ruled. The record amply supports DynCorp's suggestion that, absent DeBeer's racial animus, the evidence may

have been too weak as a matter of law to support a § 1981 claim and that therefore DeBeer's racial animus was critical. Because the district court allowed DeBeer's racial animus to be considered by the jury in deciding whether DynCorp's decision was racially motivated, it is a real possibility that it allowed the jury to find § 1981 liability erroneously. This is because DeBeer, as the subordinate of Cashon, had influence on Cashon's decision on behalf of DynCorp. Without testimony of DeBeer's racial animus, the jury was essentially left with direct evidence that Rosenkranz and Walsh laughed at racial jokes about Worldwide Services and Walsh once spoke a racial slur about Gray.

Thus, it was likely critical to the jury's verdict whether DeBeer's racial animus could be imputed to DynCorp as a motivating factor in its not renewing Worldwide Services' subcontract. Had the district court applied *Hill*, the jury would have been told that DynCorp was not "liable . . . for the improperly motivated person [DeBeer] who merely influences the decision." *Hill*, 354 F.3d at 291. We explained in *Hill* that an employee, such as DeBeer, does not become a decisionmaker whose discriminatory motivations may be attributed to the employer "simply because he *had a substantial influence* on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision." *Id.* (emphasis added). If *Hill* had been applied, the jury would have been told that Worldwide Services had to prove that DeBeer "possessed such *authority* as to be viewed as *the one principally responsible for the decision* or the actual decisionmaker for the employer" before it could consider the impact of DeBeer's racial animus. *Id.*

(emphasis added). Based on the testimony in this record that Cashon made the decision with Rosenkranz and Walsh and that DeBeer did not have the authority of one principally responsible for the decision but could only be tagged as one having influence on it, DeBeer's racial animus would not have been imputable to DynCorp.

In limiting a corporation's liability for racial discrimination in *Hill* to the conduct of persons actually responsible for the corporation's action, we carried out Congress' intent to hold a corporation responsible for racial discrimination only when its executives and employees *responsible* for the corporation's decision acted with racial animus, not when any corporate employee manifested racial animus.

The district court, however, rejected the application of *Hill* to § 1981 and instead instructed the jury that the race of Worldwide Services' owners "must have been a factor that actually led to the decision" to terminate DynCorp's relationship with Worldwide Services. As a result, the jury was permitted to consider the racial animus *of any employee* whose influence "*actually led* to the decision." The district court thus extended corporate liability for § 1981 to the actions of any person who influenced the decision, regardless of whether that person was a decisionmaker. If *Hill* was applicable, the district court's instruction was legally erroneous.

Not only was the district court's instruction erroneous under *Hill*, if *Hill* was applicable, the error was material to the outcome in this case. Without

consideration of DeBeer's racial animus, the evidence to support a verdict was thin, perhaps even fatally thin, and the district court surely recognized this. It devoted substantial discussion to why it decided not to give the *Hill* instruction, concluding that *Hill* was "not a correct statement" of § 1981 law and that corporate agency for discrimination under Title VII was "subject to stricter scrutiny" than corporate agency under § 1981. Indeed, the court acknowledged the importance of *Hill* when it stated that it "adopted whole cloth DynCorp's proffered Section 1981 jury instructions, *excluding only the language specifically addressing Hill's holding.*" (Emphasis added).

The dispositive question on appeal, therefore, reduces to whether *Hill* accurately describes when the racial animus of corporate employees may be imputed to a corporation for purposes of the corporation's liability for racial discrimination under § 1981. I submit that how racial animus is imputed to a corporation for corporate liability is the same issue, whether discrimination is alleged to be in violation of Title VII or of § 1981, as we have so recognized. Indeed, the majority, too, assumes that *Hill* applies to § 1981 claims. This assumption is, I believe, correct and determinative of this appeal.

III.

In *Hill*, a former Lockheed mechanic, whose employment was terminated on the basis of three written reprimands, brought an action against her corporate employer under Title VII and the ADEA, alleging that her team's safety inspector's

discriminatory animus led him "to report admittedly valid infractions," resulting in her second and third reprimands. *Hill*, 354 F.3d at 283. Hill's claim therefore rested on her argument that the safety inspector's alleged discriminatory animus should be imputed to the corporation. Hill did not dispute that she had violated corporate rules and standards, and she did not assert that her direct supervisors, who issued the reprimands, or her two program managers, who terminated her employment, acted with discriminatory animus. The district court granted Lockheed's motion for summary judgment, and we affirmed. We held that Hill could not base a claim on the safety inspector's animus because he was not one of the corporation's decisionmakers with respect to the decision to issue reprimands to Hill or to terminate her employment.

In reaching this result, we held that "an employer will be liable not for the improperly motivated person *who merely influences the decision* [to take an adverse employment action], but for the person who in reality makes the decision." *Hill*, 354 F.3d at 291 (emphasis added). To be sure, we did not limit corporate liability under Title VII and the ADEA to the actions of only "*formal* decisionmakers for the employer," because doing so might allow employers "to insulate themselves from liability simply by hiding behind the blind approvals, albeit non-biased, of formal decisionmakers." *Id.* at 290 (emphasis added). But we also rejected the notion that the discriminatory motivations of an employee may be attributed to the employer "simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse

employment decision." *Id.* at 291. Thus, we concluded that in determining a corporation's liability under Title VII or the ADEA, the focus must be on the motivations of those agents of the corporation *who actually made the adverse employment decision* on behalf of the corporation:

> In sum, to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

Id.

Even though *Hill* defined corporate liability under only Title VII and the ADEA, the agency issue resolved in *Hill* exists under any discrimination statute creating corporate liability. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). More to the point, in § 1981 claims, courts must answer the same "general question [of] the proper extent of a[] [corporate] employer's responsibility for the offensive acts of its employees." *Dennis v. County of Fairfax*, 55 F.3d 151, 155 (4th Cir. 1995). And Congress, in drafting § 1981, need not have provided an explicit direction to be clear that this question "implicates principles of agency law." *Id.* at 155. Indeed, we have previously recognized that the same general agency principles apply in interpreting § 1981 as

apply in interpreting Title VII. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184, 186–90 (4th Cir. 2001) (noting that under both § 1981 and Title VII there must be "some basis for imposing liability on [the corporate defendant]" and analyzing the employer's liability for a racially hostile work environment without distinguishing between the two statutes (internal quotation marks and citation omitted)); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000) (using the Title VII standard for imputing liability to a corporate employer for conduct alleged to justify punitive damages under § 1981).

Moreover, it would be analytically discordant not to apply Title VII agency principles to § 1981 agency questions. An employee alleging that his corporate employer intentionally discriminated against him on the basis of race, in violation of both Title VII and § 1981, would oddly be able to demonstrate his employer's liability under § 1981 for the discriminatory motivations of an employee who substantially influenced, but did not make, the decision to take an adverse employment action against him, but he would not be able to do so under Title VII. Similarly, an employee alleging intentional discrimination on the basis of sex or religion premised on a subordinate employee's influential animus would have no recourse, while her coworker's analogous § 1981 claim would succeed. While we must recognize that Title VII and § 1981 provide "separate, distinct, and independent" causes of action, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), the standard for imputing racial animus to a corporation in making out each claim

must, out of logical and practical necessity, be the same.

Worldwide Services argues bluntly that *Hill* should not be expanded because it was erroneously decided, relying on decisions in other circuits that have criticized Hill. See *Poland v. Chertoff*, 494 F.3d 1174, 1182-83 (9th Cir. 2007) (finding *Hill*'s rule too narrow and holding instead that "even if the biased subordinate was not the principal decisionmaker, the biased subordinate's [improper] motive will be imputed to the employer if the subordinate influenced, affected, or was involved in the adverse employment decision"); *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 487 (10th Cir. 2006) (critiquing *Hill*'s "peculiar focus on who is a decisionmaker for purposes of discrimination actions" on the ground that, under agency law principles, an employer's agents "include[] not only 'decisionmakers' but other agents whose actions, aided by the agency relation, cause injury" (internal quotation marks and citation omitted)); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (criticizing *Hill* as "inconsistent with the normal analysis of causal issues in tort litigation"); *cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2689 (2009) (Alito, J., concurring) (noting circuit split and describing *Hill* as adopting "[t]he least employee-friendly standard" by "ask[ing] only whether 'the actual decisionmaker' acted with discriminatory intent"). But, it would be inappropriate for us to limit *Hill* arbitrarily, which is precisely what we would have to do in order to conclude that the agency principles announced in *Hill* do not apply to § 1981 actions. Worldwide Services' argument that *Hill* was wrongly decided can only be directed to this court

sitting *en banc*.

In sum, the issue of when to impute the racial animus of an employee to a corporation for liability under Title VII and § 1981 must be and, indeed, is the same. *See Spriggs*, 242 F.3d at 184, 186-90; *Lowery*, 206 F.3d at 441. It was thus prejudicial error for the district court to have concluded that the standard was different and to have refused to instruct the jury on the Hill standard for determining whether the racial animus of DeBeer was imputable to DynCorp in connection with DynCorp's decision not to renew the subcontract with Worldwide Services. Because a new trial on Worldwide Services' § 1981 claim is thus required, I would vacate the judgment on the § 1981 claim, including the award of punitive damages, and remand for a new trial, requiring the district court to instruct the jury on *Hill*.

JONES, Chief District Judge, concurring in part and dissenting in part:

I join with Judge Duncan in affirming the district court's refusal to instruct the jury based on *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), its denial of a Rule 50(b) motion on the plaintiff's § 1981 claim, and its evidentiary rulings. However, I would also affirm the district court's refusal to set aside the jury's punitive damage award.[1]

The majority finds that there was insufficient evidence to support an award of punitive damages as to the § 1981 claim. To the contrary, I believe that there was ample evidence that DynCorp International, LLC ("DynCorp") terminated the subcontract it entered into with Worldwide Network Services, Inc. ("WWNS") to provide communication and information-technology services for the U.S. State Department's Civilian Police programs in Iraq and Afghanistan ("CivPol Subcontract") in the face of knowledge that "it may be acting in violation of

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[1] The result of the majority holding in this appeal is to remand the case for a new trial solely on to the issue of punitive damages as to Count 3, tortious interference with contract. Punitive damages on that count will be capped by state law at $350,000. Va. Code Ann. § 8.01-38.1 (2007). Under Judge Niemeyer's view of the case, the case would be remanded for a new trial as to both liability and damages on the § 1981 claim. Because there is no statutory cap on § 1981 punitives, this result would preserve the possibility of a larger punitive damage award – perhaps as much as $10 million, as awarded by this jury. If WWNS had its option, it might prefer Judge Niemeyer's result, but of course we do not decide legal issues on the basis of the parties' preferences.

federal law." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999).

Indeed, DynCorp was warned by WWNS that ending the CivPol Subcontract might violate WWNS's federally protected rights. On July 26, 2006, WWNS sent DynCorp's in-house counsel a letter, via e-mail and overnight mail, demanding that DynCorp immediately "comply with its obligations under the" CivPol Subcontract and informing DynCorp that WWNS had "evidence that DynCorp's actions have been racially-motivated in violation of federal anti-discrimination laws." (J.A. 2692.) The evidence also shows that the executives who made the decision to terminate the CivPol Subcontract were aware of the contents of this letter. On July 26, 2006, WWNS Chairman and CEO, Walter Gray, wrote two of DynCorp's decisionmakers, Richard Cashon and Robert Rosenkranz – as well as Herb Lanese, the CEO of DynCorp – to confirm that DynCorp's in-house counsel received the letter "regarding [DynCorp's] wrongful and improper conduct in terminating [WWNS's] services under the CivPol subcontract." (J.A. 2694.) Richard Walsh, Division Vice-President of Operations for DynCorp, later e-mailed an internal PowerPoint presentation to other DynCorp executives including Cashon, outlining the eventual termination of the CivPol Subcontract. One of the slides of the presentation stated that "[r]ecent correspondence indicate[s] that WWNS is planning legal action against [DynCorp] based on racial discrimination." (J.A. 2788.)

Comparing this case to *Anderson v. G.D.C., Inc.*, 281 F.3d 452 (4th Cir. 2002), it is clear a jury could

reasonably conclude from the July 26 letter that DynCorp's decisionmakers discriminated against WWNS "in the face of a perceived risk that its actions will violate federal law." *Kolstad*, 527 U.S. at 536. In *Anderson*, one of the defendant's employees was found to have sexually harassed the plaintiff in violation of Title VII, a federal law prohibiting discrimination on the basis of sex. 281 F.3d at 458-59. The only evidence presented that the employee knew of the Title VII prohibition was that he looked at, but did not read, a poster entitled "Sexual Harassment," advising employees of proper workplace conduct. *Id.* at 460. Nevertheless, this court found that the employee's mere "awareness" of the poster "suggested at least a rudimentary knowledge of its import" sufficient to pass the *Kolstad* test. *Id.*

Here, the DynCorp decisionmakers were directly warned, and even anticipating, that they would have to confront litigation for racial discrimination if they continued to pursue the termination of the CivPol Subcontract. Their level of awareness of WWNS's federally protected rights was therefore well beyond that of the employee in *Anderson* who at most saw the title of a poster on a wall.

DynCorp argues that, even if the July 26 letter did put the decisionmakers on notice, it came too late to avoid violating § 1981, but I find little merit to this argument. The letter was sent well before WWNS had ceased operations under the CivPol Subcontract in either Iraq or Afghanistan. Not only were the task orders under the CivPol Subcontract still in effect, but DynCorp had not yet notified WWNS of its

intention to let any of the task orders expire.

The task order in Iraq was not scheduled to end until August 11, 2006. Although DynCorp formally informed WWNS in a letter dated July 28, 2006, that DynCorp intended to let the personnel portion of this task order expire, DynCorp also extended its purchase of services from WWNS in Iraq another thirty days.

Moreover, the four task orders in Afghanistan continued until August 31, September 8, September 30, and October 9, 2006, months after WWNS's warning. According to the CivPol Program Manager Richard Cashon, "The task orders in Afghanistan had a little bit more time on them . . . . It could have been conceivable to continue with WWNS in Afghanistan, if the situation dictated it, even though we were transitioning out of Iraq." (J.A. 1678.) According to DynCorp's own PowerPoint presentation, the "[f]inal transition" from WWNS was not set to occur until October 9, 2006. (J.A. 2791.) Thus, even if, by July 26, 2006, DynCorp's decisionmakers were already scheming to terminate the CivPol Subcontract, they still had plenty of time to reverse their decision in order to avoid violating § 1981.

Accordingly, I find that there was sufficient evidence that DynCorp was aware that its actions might violate WWNS's federally protected rights,[2]

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[2] It is true, as Judge Duncan points out, that in affirming the punitive damage award, the district court did not cite any evidence that DynCorp had knowledge that it might violate § 1981. However, DynCorp never claimed below that it lacked knowledge of WWNS's federally protected rights.

and I would not vacate the punitive damage award on this ground.

In addition, because DynCorp did not properly object to the district court's punitive damage instruction to the jury, and because the instruction given did not prejudice DynCorp, I would not vacate the award on that ground.

Finally, the amount of the punitive damage award does not violate due process, as argued by DynCorp, and is not assailable for that reason. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (holding that a single digit ratio, especially four to one or less, between punitive and compensatory damages is "likely to comport with due process").

For these reasons, while I otherwise agree with Judge Duncan, I respectfully dissent from setting aside the jury's punitive damage award.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WORLDWIDE NETWORK SERVICES, LLC
WORLDWIDE NETWORK SERVICES
INTERNATIONAL, FZCO

v. 07CV 627

DYNCORP INTERNATIONAL, LLC

AMENDED JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that

Judgment is entered in favor of plaintiffs, Worldwide Network Services, LLC and Worldwide Network Services International, FZCO (hereafter as Plaintiffs) and against defendant Dyncorp International, LLC (hereafter as Defendant) as to Count 1, Discrimination in Contracting and awards compensatory damages in the amount of $3.42 million.

Prejudgment interest is awarded as to Count 1 to commence from August 11, 2006.

Judgment is entered in favor of Plaintiffs and against Defendants as to Count 3, Tortious Interference With Employment Contract and compensatory damages

are awarded in the amount of $83,000.

Judgment is entered in favor of Defendant and against Plaintiffs as to Count 4, Tortious Interference With Prospective Economic Advantage.

Judgment is entered in favor of Defendant and against Plaintiffs as to Count 5, Common Law Civil Conspiracy.

Judgment is entered in favor of Defendant and against Plaintiffs as to Count 6, Virginia Business Conspiracy.

Judgment is entered in favor of Plaintiffs and against Defendant as to Count 7, Breach of CivPol Subcontract Invoices Rejected by Dyncorp International, LLC and award damages in the amount of $558,510.42.

Prejudgment interest is awarded on the Breach of the CivPol Subcontract commencing on September 25, 2006.

Judgment is entered in favor of Plaintiffs and against Defendant as to the Invoices Pending Completion of Dyncorp Internal Review Process and damages are awarded in the amount of $336,985.01.

Prejudgment interest is awarded on the Invoices Pending Completion of Internal Review Process commencing on September 25, 2006.

Judgment is entered in favor of Plaintiffs and against Defendant on Count 8, Breach of the WPPS Subcontract and damages are awarded in the amount

of $42,092.62.

Prejudgment interest is awarded on the Breach of the WPPS Subcontract commencing on September 25, 2006.

Judgment is entered in favor of Plaintiffs and against Defendant on the Invoices Pending Completion of Dyncorp Internal Review Process in the amount of $42,092.62.

Prejudgment interest is awarded as to the Invoices Pending Completion of Dyncorp Internal Review Process commencing on September 25, 2006.

Judgment is entered in favor of Plaintiffs and against Defendant as to Count 9, Breach of Implied Duty of Good Faith and Fair Dealing and damages are awarded in the amount of $720,000.

Judgment is entered in favor of Plaintiffs and against Defendant and punitive damages are awarded in the amount of $10 million.

Judgment is entered in favor of Plaintiffs and against Defendant on the Breach of CivPol Subcontract Counterclaim.

Judgment is entered in favor of Defendant and against Plaintiffs as to the Breach of WPPS Subcontract Counterclaim and damages are awarded in the amount of $178,000.

Prejudgment interest is awarded commencing on August 11, 2006.

Judgment is entered in favor of Plaintiffs and against Defendant as to the Breach of Warranty of Supplies/Services Counterclaim.

Judgment is hereby entered in accordance with the Jury Verdict returned on May 14,2008 and the Jury Verdict is attached.

In addition, Judgment is hereby entered in accordance with the Court's Amended Order dated June 17, 2008, attached, for Plaintiffs and against Defendant DynCorp International, LLC in the amount of $2,553,105.86 for the invoices listed therein (see Amended Order for details).

Further, also in accordance with the Court's Amended Order dated June 17, 2008, attached, Judgment is hereby entered for Plaintiffs and against Defendant DynCorp International, LLC for prejudgment interest at a rate of 5% over the Federal Reserve discount rate pursuant to Delaware law, commencing from October 1, 2006 and ending on the date of payment.

June 19, 2008 — Date

Fernando Galindo — Clerk

No. 10-11

IN THE

Supreme Court of the United States

WORLDWIDE NETWORK SERVICES, LLC, AND
WORLDWIDE NETWORK SERVICES INT'L, FZCO

Petitioners,

v.

DYNCORP INTERNATIONAL LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in vacating the punitive damages award for lack of evidence of malice or reckless indifference toward petitioners' federally protected rights.

CORPORATE DISCLOSURE STATEMENT

DynCorp International LLC is a wholly owned subsidiary of DynCorp International Inc., which is a wholly owned subsidiary of Delta Tucker Holdings, Inc., which is a wholly owned subsidiary of DefCo Holdings, Inc., which is a wholly owned subsidiary of Cerberus Capital Management, L.P., a private company.

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INTRODUCTION

This case arises out of a contract dispute between respondent DynCorp International LLC and petitioner Worldwide Network Services, LLC (WWNS). DynCorp contracted with the United States Department of State to provide police training services in Iraq and Afghanistan, and subcontracted with WWNS to provide information-technology and communications services in support of this police training mission. In July 2006, after the State Department repeatedly and forcefully complained about the poor quality of WWNS's work and threatened actually to terminate DynCorp's contract unless the serious problems were corrected, DynCorp decided not to renew WWNS's subcontract.

WWNS, which is a minority-owned corporation certified by the Small Business Administration, brought suit alleging that DynCorp's decision not to renew the subcontract was racially discriminatory in violation of 42 U.S.C. § 1981. At trial, WWNS presented no evidence that DynCorp's program manager who made the decision not to renew the subcontract was motivated by race; its own witnesses conceded that he was a "straight-shooter." Instead, the trial veered off into testimony regarding alleged racially oriented comments by subordinate employees who did not make the decision to allow WWNS's subcontract to expire and had no authority to make that decision. The district court, however, refused to instruct the jury on the proper standard for imputing racial animus to a corporation under § 1981, and the jury returned a verdict for WWNS, awarding it $3.42 million in compensatory damages and $10 million in punitive damages.

In an unpublished opinion, the Fourth Circuit affirmed the compensatory award but vacated the punitive damages. Applying this Court's decision in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), the court of appeals concluded that the punitive award could not stand because there was no evidence that DynCorp acted with malice or reckless indifference to WWNS's federally protected rights and, independently, because the jury instructions misstated the standard for awarding punitive damages under *Kolstad*.

WWNS now seeks review of only the first of these two alternative holdings. It argues that the Fourth Circuit erred in refusing to consider the supposedly "egregious" nature of DynCorp's conduct as relevant evidence supporting the punitive damages award. As WWNS admits, however, the Fourth Circuit did not address the question whether egregious conduct can support a punitive award—it had no occasion to because it disagreed with WWNS's assessment of DynCorp's conduct as "egregious." Instead, the court faithfully applied *Kolstad*, "combing the record" and finding no evidence that DynCorp acted in the face of a perceived risk that failing to renew WWNS's subcontract might violate § 1981.

The Fourth Circuit's factbound application of *Kolstad* is correct and does not conflict with the decisions of any other circuits. No doubt recognizing as much, WWNS resorts to transparent mischaracterizations of both the decision below and prior Fourth Circuit cases, attributing to them a "rule" the Fourth Circuit has never adopted. In place of that phantom "rule," WWNS proposes a rule that no court has ever adopted, all the while ignoring the fact that even if this Court were to adopt that rule, it would not change the outcome of this case because

the decision below rests on an independent ground that WWNS has not challenged. In sum, WWNS's petition for certiorari is meritless and should be denied.

STATEMENT OF THE CASE

1. DynCorp is a government contractor that performs security and peacekeeping services throughout the world, primarily in war-torn areas such as Iraq, Afghanistan, and Somalia. In 2004, DynCorp won a recompetition for a contract in support of the State Department's civilian police (CIVPOL) programs in Iraq and Afghanistan. The CIVPOL contract was DynCorp's largest single government-services contract; together with the related Worldwide Protective Services contract, it generated "a large majority" of DynCorp's total revenue. J.A. 1608.

WWNS is a small company owned in part by Walter Gray and Reginald Bailey, who are African-American. In 2004, after Gray and Bailey met DynCorp's former CEO, Steven Cannon, DynCorp awarded WWNS a subcontract under the CIVPOL program for IT and communications services in Iraq and Afghanistan. J.A. 42–85, 818–21. Before it began working for DynCorp, WWNS's work had consisted entirely of "small things" such as installing software and networks for local banks. *Id.* at 590.

Reliable satellite, radio, and IT equipment and services are vital to DynCorp's mission in Iraq and Afghanistan—miscommunications on the ground can be fatal. Yet throughout the two-and-a-half years of WWNS's performance under the subcontract, personnel from DynCorp, the State Department, and WWNS itself complained repeatedly about numerous problems with WWNS's performance, including

improper installation of equipment and software; untimely and improper maintenance of networks; and lack of qualified personnel to maintain and support the systems. See, *e.g.*, J.A. 115–18, 164–67, 1053–54, 1614–16, 2463–67, 2604, 2660, 2760, 2778.

The problems with WWNS's severely deficient performance came to a head in 2006, when in the space of just six months DynCorp received three letters from high-ranking State Department officials complaining in unusually graphic terms about WWNS's performance and threatening to terminate DynCorp's massive CIVPOL contract in its entirety as a result.

The first letter, dated January 9, 2006, and addressed to DynCorp's CEO, was from Principal Deputy Assistant Secretary for the Bureau of International Narcotics and Law Enforcement (INL) Thomas Schweich. He stated bluntly that "WWNS's technical performance has in general been inadequate to the point where it has disrupted critical communications in the field." J.A. 117. Schweich urged DynCorp to give the problem its "immediate attention," and threatened to "resort to a cure notice"—the final step before contract termination—if DynCorp did not "develop and implement a credible corrective action plan and ensure that necessary changes are effected." *Id.* at 115, 117.

In a second letter dated January 26, 2006, John D. Smith, the State Department's INL representative in Baghdad, wrote a blistering five-page memorandum complaining in detail about WWNS's performance. J.A. 2463–67. He catalogued a number of "severe shortcomings" in WWNS's performance, including radios that fell "far short of meeting [needs]," "regular service outages," "poor insulation on connections

to outside equipment," and highly sensitive wireless networks protected by flawed encryption technology that could be "cracked within minutes using a variety of utilities available in the public domain on the Internet!" *Id.* at 2464–66. "In short," Smith exclaimed, "the networks are in a state of disarray, disrepair, unmanageable, unsecured, and chaotic!" *Id.* at 2465. As a result of these problems and a long "list of similar examples," Smith complained, "the networks are in a catastrophic state barely capable of delivering service of any quality." *Id.* at 2466.

In the ensuing months, DynCorp attempted to manage WWNS more closely in an effort to improve its performance, but serious performance deficiencies continued. In May 2006, U.S. Ambassador Newman complained to DynCorp personnel in Afghanistan about the poor communications systems provided by WWNS. J.A. 1629–31. And on June 23, 2006, the State Department wrote a third letter to DynCorp complaining of "pervasive information technology (IT) performance deficiencies on all DynCorp Task Orders." *Id.* at 164. Signed by the State Department's contracting officer, Benita Williams, and directed to DynCorp's CEO, the letter reminded DynCorp about INL's numerous "written and verbal complaints about IT performance over the past two years," and provided a three-page bullet-point list of "specific issues that have been raised." *Id.* Williams made clear that the persistence of these problems was unacceptable:

> The varied nature of these problems and their pervasiveness suggests that they are systemic and consequently need to be addressed at higher levels of your organization than has previously been the case. I would like to arrange a meeting to discuss this broad spectrum of information

> technology deficiencies with your program managers, including at least one senior member of your information technology staff, and INL representatives.

Id. at 167.

Three weeks later, in mid-July 2006, DynCorp vice-president and CIVPOL program manager Richard Cashon decided not to renew WWNS's subcontract. J.A. 1676. Cashon based his decision on internal reports DynCorp had prepared on WWNS's performance and on the State Department's repeated complaints. *Id.* at 1050–62, 1675–76, 1684–86. In particular, the June 23 letter from the contracting officer "weighed heavily" on his decision because she was the one who could issue a cure notice that could lead directly to a decision to terminate DynCorp's contract for cause. *Id.* at 1056–57. As Cashon explained, "I didn't feel like that we could afford to move forward, award a new task order to WWNS, put them in our proposal, and tell the State Department that we're still correcting problems. I just did not feel like we could do that and survive staying on the contract." *Id.* at 1676.

DynCorp's board of directors and senior executives concurred with Cashon's conclusion. At a board meeting on July 13, 2006, the chairman of the board questioned DynCorp's CEO, Steven Cannon—who was responsible for DynCorp's relationship with WWNS and had been WWNS's strongest defender in the company—regarding "complaints received from the State Department." J.A. 2670. "Cannon responded that it might become necessary to replace the subcontractor in question." *Id.*

2. In October 2006, WWNS brought this action alleging that DynCorp's decision not to renew its

subcontract was racially discriminatory in violation of § 1981. At trial, however, WWNS presented no evidence that Cashon's decision was motivated by race. To the contrary, WWNS's own witnesses conceded that Cashon never made discriminatory remarks and in fact that he was a "straight-shooter." J.A. 829, 905, 1232, 1740. Instead, WWNS's case centered on discriminatory remarks allegedly made by subordinate employees who neither made nor had authority to make the decision not to renew WWNS's subcontract.

Leon DeBeer. WWNS employee Charlie Jones testified that Leon DeBeer, a low-level IT manager for DynCorp in Iraq, uttered numerous racial epithets on a daily basis. J.A. 902. DeBeer, a white South African, allegedly referred to one of WWNS's owners using racial slurs. *Id.* at 872, 931. DeBeer had no authority with respect to renewal of WWNS's subcontract; the only evidence of his role in the decision was Cashon's testimony that DeBeer "provided information" regarding WWNS's performance and that Cashon "used that information, along with other information [he] had, in making [his] decision." *Id.* at 937.

Mike Kehoe. Jones also testified that Mike Kehoe, a deputy program manager assigned to a different contract, once referred to WWNS as " 'where white men never stay.' " J.A. 892. WWNS did not allege that Kehoe had any role in the decision not to renew its subcontract, and in fact he had none. *Id.* at 889. Yet WWNS featured Kehoe's alleged remark prominently at trial and even displayed a demonstrative exhibit stating, "WWNS"—"Where White [P]eople Never Stay." *Id.* at 572.

William Cavanaugh. Former DynCorp employee Richard Spencer testified regarding a dinner of

DynCorp's senior government-services staff held in October 2006—three months after the decision was made not to renew WWNS's subcontract. Spencer testified that William Cavanaugh, a business-development manager, gave a mock presentation in honor of the departure of Richard Walsh, a DynCorp vice-president and IT expert who had been brought on to mentor WWNS in response to the State Department's complaints. Cavanaugh gave Walsh a T-shirt that said "WWNS—I took them down and all I got was this lousy T-shirt," and allegedly read a series of fictitious letters, the last of which purported to be from Gray. J.A. 1021–23, 1027–30, 1139. According to Spencer, Cavanaugh attempted to imitate Gray, but "[d]id a very bad imitation . . . because then he started speaking like—who's that character on—on Fat Albert." *Id.* at 1023. Spencer could not recall the substance of the letter, only that Cavanaugh's "bad impression" of Gray came across as his "interpretation of Ebonics." *Id.* at 1029. Cavanaugh had no role in the decision not to renew WWNS's subcontract. *Id.* at 1147.

3. In contrast to this barrage of racially charged evidence regarding subordinate employees who neither made nor had authority to make any decisions regarding WWNS's subcontract, WWNS presented only three pieces of evidence regarding individuals who it claimed participated in Cashon's decision not to renew the subcontract. As Judge Niemeyer observed, in an understatement, the evidence of alleged animus by these individuals was "much weaker and more isolated" than that attributed to subordinate employees. Pet. App. 50a (opinion concurring in part and dissenting in part).

First, Spencer testified that Walsh and Robert Rosenkranz, the president of the government-services

division and Cashon's supervisor, laughed during Cavanaugh's roast of Walsh at the Tyson's Corner dinner. J.A. 1029. According to Spencer, however, "everybody was laughing." *Id.* at 1022–23. This would have included Michelle Beale, Rosenkranz's office manager, who is African-American. *Id.* at 1112–14.

Second, over DynCorp's objection as to relevance, WWNS presented evidence that DynCorp had fired Spencer, who is Hispanic, and that Rosenkranz had signed the termination letter. J.A. 1019–21. Spencer speculated that he had been terminated because of his race, but provided no evidence to substantiate that claim. See *id.* Moreover, Spencer specifically declined to attribute racial animus to Rosenkranz, explaining that he had "a fairly good" relationship with Rosenkranz, *id.* at 1020; that Rosenkranz was "not a bad guy," *id.*; and that as a retired two-star general, Rosenkranz would not have made decisions based on race, *id.* at 3160-A.

Third, during its rebuttal on the last day of trial—without any prior disclosure to DynCorp and in flagrant violation of Federal Rule of Civil Procedure 26(e)—WWNS called one of its owners, John Mack. Mack self-servingly claimed that at a meeting sometime in late 2005, Walsh had called Gray "a stupid black mother—." J.A. 1722–23. DynCorp moved to strike Mack's ambush testimony but the district court refused, stating that it would be futile "to tell the jury to disregard the hot poker that has just been put in front of their face." *Id.* at 1730. The court of appeals held that WWNS "clearly violated Rule 26(e)" by failing to disclose Mack's allegation during discovery or at any other time during the previous 20 months of litigation, and that "no substantial justification existed" for WWNS's lying in

the weeds, but concluded that Mack's testimony was somehow harmless. Pet. App. 28a–30a.

4. In light of the extensive evidence WWNS had presented of alleged animus by subordinate employees, DynCorp asked the district court to instruct the jury on the appropriate standard for imputing racial bias to a corporation under § 1981. In particular, DynCorp asked the court to instruct the jury in accordance with the en banc Fourth Circuit's decision in *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (2004), which held that a plaintiff may not rest a discrimination claim against a corporation on the discriminatory motivations of a subordinate employee unless the employee was the actual decisionmaker or the one principally responsible for the decision at issue. *Id.* at 289. The district court refused to give DynCorp's proposed instruction, concluding that WWNS was required only "to prove the corporation was liable," and "the jury doesn't have to specify which person did what." J.A. 1656. The court instead instructed the jury that it should find for WWNS if it concluded that "DynCorp had a discriminatory purpose or motive." *Id.* at 1959.

In accordance with this Court's decision in *Kolstad*, DynCorp also asked the district court to instruct the jury that punitive damages were available only if "a higher management official of DynCorp personally acted with malice or reckless indifference to WWNS's federally protected rights." J.A. 1186. The district court refused and instead gave a *sua sponte* instruction authorizing the jury to award punitive damages if it found that "DynCorp, maliciously or with reckless indifference discriminated against WWNS." *Id.* at 1645, 1966.

The jury returned a verdict for WWNS, awarding it $3.42 million in compensatory damages and $10 million in punitive damages.

5. In an unpublished and badly divided set of opinions, the Fourth Circuit affirmed as to liability under § 1981 but vacated the punitive damages award. Over Judge Niemeyer's dissent, the panel held that the district court did not err in refusing to instruct the jury to disregard the motivations of subordinate employees. Pet. App. 18a–23a. "As a result, the jury was permitted to consider the racial animus *of any employee* whose influence '*actually led* to the decision,'" regardless of whether that employee made or was principally responsible for the decision not to renew WWNS's subcontract. *Id.* at 52a (Niemeyer, J., concurring in part and dissenting in part).

The court of appeals vacated the punitive damages award for two independent reasons. *First*, the court found no evidence that DynCorp acted with malice or reckless indifference to WWNS's federally protected rights, as required by this Court's decision in *Kolstad*. Pet. App. 30a–35a. After "combing the record," *id.* at 35a, the court found no evidence that DynCorp had "acted in the face of a perceived risk that its decision would violate federal law," *id.* at 31a (internal quotation marks and alteration omitted). In addition, the court noted that "the legal theory WWNS advanced was 'novel or otherwise poorly recognized,' because whether a corporation may sue under § 1981 was never crystal clear." *Id.* at 35a n.13 (internal citation omitted) (quoting *Kolstad*, 527 U.S. at 537).

Second, "[e]ven aside from the above error," the court concluded that "the award of punitive damages could not stand because the district court's jury instruction on punitive damages was also erroneous."

Pet. App. 35a–36a. The instruction permitted the jury to award punitive damages if "'DynCorp maliciously, or with reckless indifference, discriminated against WWNS,'" but "never defined 'malice' or specified to what 'reckless indifference' refers." *Id.* at 36a. Because "a layperson would not know" that these terms have "a technical legal meaning relating to awareness that one may be breaking the law," the instruction left the jury "in complete ignorance of fundamentally controlling legal principles." *Id.* at 36a–37a (internal quotation marks and omission omitted). And because "WWNS ha[d] not identified any evidence that DynCorp suspected that terminating the CivPol Subcontract might violate federal law," "serious prejudice necessarily resulted from the challenged instruction." *Id.* at 37a.

WWNS petitioned for rehearing and rehearing en banc, arguing that the panel's decision vacating the punitive damages award conflicted with *Kolstad*, prior Fourth Circuit precedent, and decisions of other courts of appeals. The court denied the petition without calling for a response from DynCorp. Pet. App. 3a. "No judge requested a poll . . . on the petition for rehearing en banc." *Id.*

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied because this case does not satisfy the Court's criteria for certiorari review. The decision below correctly applied this Court's controlling decision in *Kolstad* and, as WWNS concedes, did not address the question presented in WWNS's petition. No circuit conflict exists on the standard for awarding punitive damages; the law is well settled and has been since *Kolstad*. The Fourth Circuit did not adopt the "rule" WWNS attributes to it, and no court has adopted the

rule WWNS proposes. And the decision below is supported by an independent ground that would require affirmance regardless of how the Court ruled on the question presented. The petition lacks merit and should be denied.

I. THE FOURTH CIRCUIT FAITHFULLY APPLIED *KOLSTAD*.

1. In *Kolstad*, this Court considered the standard for awarding punitive damages under 42 U.S.C. § 1981a. Modeled on the common-law standard described in *Smith* v. *Wade*, 461 U.S. 30 (1983), § 1981a limits punitive damages to cases in which the defendant discriminated "with malice or reckless indifference to the federally protected rights of an aggrieved individual."

Kolstad held that this standard "ultimately focus[es] on the actor's state of mind." 527 U.S. at 535. "The terms 'malice' or 'reckless indifference,'" the Court explained, "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* Accordingly, to be liable in punitive damages, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law." *Id.* at 536.

Under this standard, the Court made clear that not every instance of intentional discrimination will warrant punitive damages. "In some instances," for example, "the employer may simply be unaware of the relevant federal prohibition." *Id.* at 536–37. In other instances, the employer may "discriminat[e] with the distinct belief that its discrimination is lawful." *Id.* at 537. In still others, the plaintiff's "underlying theory of discrimination may be novel or otherwise poorly recognized." *Id.*

Because the punitive damages standard turns on the defendant's subjective state of mind, the Court rejected the argument that punitive damages are available only when the defendant's conduct is objectively "egregious." *Id.* at 538–39. Although "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive,'" the Court concluded that such a showing is not necessary because "eligibility for punitive awards is characterized in terms of a defendant's motive or intent." *Id.* at 538.

2. The Fourth Circuit faithfully applied *Kolstad* in vacating the punitive damages award for lack of evidence of malice or reckless indifference to WWNS's federally protected rights. As an initial matter, punitive damages should never have been awarded in this case because the jury was improperly allowed to consider evidence of racial animus by subordinate employees who neither made nor had authority to make the decision not to renew WWNS's subcontract. As Judge Niemeyer explained, the case should have been remanded for a new trial to permit a properly instructed "jury to resolve who DynCorp's decisionmaker or decisionmakers were and whether *they* were actually motivated by racial animus." Pet. App. 41a (opinion concurring in part and dissenting in part); see also *Staub* v. *Proctor Hosp.*, No. 09-400 (U.S. Apr. 19, 2010) (certiorari granted on the question, "In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?").

Even accepting the panel's decision as to liability, however, the decision below is fully consistent with *Kolstad*. The court of appeals properly stated the controlling rule of law—that punitive damages are

available only when the employer discriminates "'in the face of a perceived risk that its actions will violate federal law.'" Pet. App. 31a (quoting *Kolstad*, 527 U.S. at 536). It then "comb[ed]" the massive record in this case and found no "evidence that DynCorp terminated the CivlPol Subcontract in the face of a perceived risk that its decision would violate federal law." *Id.* at 34a–35a (internal quotation marks and alteration omitted).

In addition, the court noted that WWNS's theory of liability was novel or poorly recognized because it is far from clear that corporations like WWNS even *have* federally protected rights under § 1981. See Pet. App. 35a n.13; see also *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 473 n.1 (2006) ("[W]e have no occasion to determine whether . . . a corporation . . . *could* have brought suit under § 1981."); *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) ("a corporation . . . has no racial identity and cannot be the target of . . . discrimination").

Putting WWNS's overblown rhetoric aside, the decision below is thus no more than a routine and unremarkable application of *Kolstad*. WWNS indeed failed to present any evidence that DynCorp knew that not renewing WWNS's subcontract might violate federal law. In any event, WWNS's "asserted error" at best "consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. WWNS thus asks this Court to expend its limited resources to engage in the very definition of factbound error-correction where no error is apparent. The petition should be denied for that reason alone.

3. Unable to identify anything in the decision below that conflicts with *Kolstad*, WWNS asks this

Court to grant review on a question that WWNS acknowledges "the court of appeals declined to address or consider"—namely, whether egregious discrimination can itself support an inference of malice or reckless indifference to the plaintiff's federally protected rights. Pet. for Cert. 3. Of course, the fact that the court of appeals did not address the question on which WWNS seeks review is alone sufficient reason to deny the petition. See Eugene Gressman et al., *Supreme Court Practice* 506 (9th ed. 2007) (when "the petition raises questions that were not decided by the court below," that "defect is ordinarily fatal to the petition"). There are two additional reasons as well.

First, the factual predicate for WWNS's argument—that this case involves egregious discrimination—is wrong. The record contains overwhelming evidence of WWNS's deficient performance, exemplified most dramatically by the State Department's three complaint letters threatening to terminate DynCorp's largest contract with its most important customer if it did not remedy the situation with WWNS. Moreover, it is beyond dispute that the individual who made and was principally responsible for the decision not to renew WWNS's subcontract—Cashon—acted both without racial animus and with ample legitimate cause. In these circumstances, DynCorp's decision not to renew WWNS's subcontract cannot fairly be described as "egregious."[1]

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[1] *See, e.g., Smith* v. *Xerox Corp.*, 602 F.3d 320, 336 (5th Cir. 2010) (punitive damages not warranted "[i]n light of the competing evidence that impugned [the plaintiff's] performance"); *Webner* v. *Titan Distribution, Inc.*, 267 F.3d 828, 837 (8th Cir. 2001) (same because the defendant's "actions [were] consistent with an employer acting to protect itself");

To be sure, the record also contains inflammatory evidence of racial animus by subordinate employees. But the evidence of animus by DynCorp's actual decisionmaker (Cashon) was nonexistent, and the evidence as to the other executives who WWNS claims participated in the decision (Rosenkranz and Walsh) was vanishingly thin. The bulk of WWNS's evidence at trial focused on racially derogatory comments allegedly made by subordinate employees like DeBeer who had no decisionmaking authority with respect to renewal of WWNS's subcontract. Although these alleged comments were undoubtedly odious and offensive, which explains the jury's verdict, they did not render the decision at issue—DynCorp's corporate decision to end its relationship with WWNS in order to salvage its relationship with the State Department—an aggravated instance of racial discrimination warranting punitive damages.[2]

The court of appeals did not reach a contrary conclusion. It did not characterize DynCorp's conduct as "egregious"; indeed, the word "egregious" does not appear in the court's opinion. The court thus did not

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Tincher v. *Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1133 (7th Cir. 1997) (same because the "issue of liability . . . was extremely close" and "another jury could just as easily have found that [the defendant's] reason for the termination was not pretextual"); *Stephens* v. *S. Atl. Canners, Inc.*, 848 F.2d 484, 492 (4th Cir. 1988) (same because the plaintiff's poor performance "came very close to jeopardizing the business relationship his employer had with a major customer").

[2] *See, e.g.*, *Kolstad*, 527 U.S. at 543 (an employer may be held vicariously liable in punitive damages only for the acts of managerial-level employees); *EEOC* v. *Fed. Express Corp.*, 513 F.3d 360, 372 (4th Cir.) (punitive damages are available only if "the employer's *decision maker* discriminated in the face of a perceived risk that the decision would violate federal law") (emphasis added), *cert denied*, 129 S. Ct. 343 (2008).

deem egregious conduct "irrelevant to the punitive damages question," as WWNS contends. Pet. for Cert. 8. It never reached that question. Nor did even Judge Jones in dissent conclude that "the egregious discrimination in this case" supplied the requisite evidence of malice or reckless indifference. *Id.* at 7. Judge Jones (wrongly) found sufficient evidence that DynCorp decided not to renew WWNS's subcontract "in the face of knowledge that 'it may be acting in violation of federal law.'" Pet. App. 59a–60a (opinion concurring in part and dissenting in part) (quoting *Kolstad*, 527 U.S. at 535). But nowhere did he suggest that the supposedly "egregious" nature of DynCorp's conduct supported the award.

Second, even if the court of appeals had concluded *sub silentio* that DynCorp's decision not to renew WWNS's subcontract was "egregious," the decision below still would not conflict with *Kolstad*. The Court in *Kolstad* stated only that egregious conduct "*may* serve as evidence supporting" the requisite inference of malice or reckless indifference. 527 U.S. at 538 (emphasis added). *Kolstad* did not hold that egregious conduct *always* supports a punitive award, let alone that it is always independently *sufficient* to sustain an award without any evidence that the defendant perceived a risk that its conduct might violate federal law.

Indeed, *Kolstad* said little about the circumstances in which egregious conduct might support an inference of malice or reckless indifference. But it said enough to make clear that the controlling issue is the defendant's state of mind, and the nature of the defendant's conduct is relevant only to the extent it suggests the defendant was aware of the plaintiff's federally protected rights. As the Court explained, "[c]onduct warranting punitive awards has been

characterized as 'egregious' . . . *because* of the defendant's mental state," and "the reprehensible character of the conduct is not generally considered apart from the requisite state of mind." *Id.*

Attempting to manufacture a conflict with *Kolstad*, WWNS insinuates that the court of appeals held that egregious conduct can *never* support a punitive damages award. See Pet. for Cert. 11 (arguing that the court adopted a "rule that egregious evidence of racism itself cannot establish the requisite mental state"); *id.* at 13 (asserting that the court refused "to consider the egregiousness of discriminatory conduct as relevant evidence"). Of course, the decision below held no such thing. The court said nothing about whether or when egregious conduct might support a punitive damages award. And even if it had, the decision would not be binding on future Fourth Circuit panels because it is unpublished. Pet. App. 7a.

Undeterred, WWNS contends that the court of appeals was "woodenly" following prior Fourth Circuit decisions holding that egregious conduct is irrelevant. Pet. for Cert. 10–12. But all of the decisions WWNS cites, like this case, involved only factbound applications of *Kolstad*. None held or even suggested that egregious conduct is never relevant in assessing malice or reckless indifference. Indeed, one of the decisions WWNS cites expressly relied on the "rank offensiveness" of the defendant's conduct as evidence supporting the punitive damages award. *Anderson* v. *G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002). In claiming that the Fourth Circuit "refus[es] to consider the egregiousness of discriminatory conduct as evidence of the requisite mental state for punitive damages," Pet. for Cert. 10–11, WWNS is tilting at windmills.

For these reasons, the Fourth Circuit's decision is correct and certainly does not conflict with *Kolstad*. WWNS's suggestion that the decision below should be summarily reversed in light of *Kolstad* is frivolous. If anything, summary reversal would have been appropriate had the court of appeals sustained the punitive damages award on this record.

II. THERE IS NO CIRCUIT CONFLICT ON THE QUESTION PRESENTED.

WWNS's attempt to conjure a circuit split fares no better. As evidence of the supposed conflict, WWNS points to decisions in other circuits that have considered egregious conduct a relevant factor in assessing malice or reckless indifference to federally protected rights. Pet. for Cert. 13–14. These decisions do not conflict with the decision below because the Fourth Circuit (1) did not conclude that DynCorp's conduct was "egregious"; and (2) did not hold, and has never held, that egregious conduct is irrelevant to the punitive damages inquiry. WWNS's imagined conflict rests on a gross mischaracterization of both the decision below and prior Fourth Circuit precedent. Because the Fourth Circuit has never adopted the "rule" WWNS attributes to it, WWNS's attempt to gin up a circuit split is not only off-track; it never leaves the station.

In fact, *Kolstad* has produced no discernible confusion in the lower courts. All courts recognize that "the guiding inquiry is whether the defendant acted in the face of a perceived risk that his actions will violate federal law." *DiMarco-Zappa* v. *Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001) (internal quotation marks and alteration omitted). The six cases WWNS cites (and the dozens of others it does not) are merely applications of this settled rule to the varying facts of each particular case. Courts have had

no trouble understanding or applying *Kolstad*, and no divisions have arisen among the circuits as to any unresolved legal questions left in its wake. All that remains is application of law to fact.

Moreover, just as no court has adopted the rule WWNS mistakenly attributes to the Fourth Circuit, no court has adopted the rule WWNS proposes—that egregious conduct *always* supports a punitive damages award. To the contrary, courts have held that "the presence (or absence) of [egregious] acts does not in itself determine the propriety (or lack of propriety) of punitive damages in a given case." *Iacobucci* v. *Boulter*, 193 F.3d 14, 26 (1st Cir. 1999). Hewing to *Kolstad*, courts have recognized that each case must be analyzed on its own facts, and have held only that egregious conduct *may* in certain circumstances support the requisite inference as to the defendant's mental state.[3] Courts have held, for

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[3] *See, e.g.*, *Smith*, 602 F.3d at 336 ("Although egregious or outrageous conduct *can* support an inference of 'evil motive,' that showing is not present here." (footnote omitted)); *Méndez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 49 (1st Cir. 2009) ("[W]e have observed that if a defendant's conduct is 'egregious or outrageous,' it *may* suggest an awareness of its illegality."); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 796 (8th Cir. 2004) ("Thus, *in this case* the same evidence that the jury used to support its finding of racial motivation . . . also supports an inference of intentional and malicious conduct . . . ."); *United States* v. *Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005) (egregious conduct "*may* serve as evidence supporting" the requisite inference) (internal quotation marks omitted); *Powell* v. *Alexander*, 391 F.3d 1, 19 (1st Cir. 2004) (egregious conduct may serve "*in appropriate circumstances*, both as evidence of the alleged violation of a federal right and as evidence of the defendant's awareness of the risk that her actions would violate that federal right"); *Passantino* v. *Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515 (9th Cir. 2000) ("egregious conduct *could be* evidence of intent to break

example, that an employer's efforts to conceal its discriminatory conduct "may demonstrate that the employer acted with the requisite mental state." *Hall* v. *Consol. Freightways Corp. of Del.*, 337 F.3d 669, 675 (6th Cir. 2003). But no court has held that punitive damages are appropriate whenever the defendant's conduct can be characterized as "egregious," regardless of whether that conduct reveals an awareness of the plaintiff's federally protected rights.

Nor has any court held that egregious conduct is always (or indeed ever) independently *sufficient* to sustain a punitive damages award absent any evidence that the defendant knew its conduct might be unlawful. Rather, courts have recognized that the "standard for punitive damages requires something more than the employer's mere awareness that its conduct constitutes intentional discrimination however egregious it might be." *Hysten* v. *Burlington N. Santa Fe Ry.*, 530 F.3d 1260, 1278 (10th Cir. 2008). WWNS cites no authority to the contrary. All of the cases it cites, with one possible exception, relied on the defendant's knowledge of the plaintiff's federally protected rights in addition to the egregiousness of its conduct.[4]

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the law"); *Hertzberg* v. *SRAM Corp.*, 261 F.3d 651, 661 (7th Cir. 2001) ("the egregiousness of conduct *might* support an inference that the employer acted with the requisite state of mind") (emphases added throughout).

[4] *See DiMarco-Zappa*, 238 F.3d at 38 (concluding that the "defendants had to know that [their] discrimination was illegal"); *Space Hunters*, 429 F.3d at 427 (emphasizing that the defendants were "acutely" aware of the federal statute at issue and recognized the risk that their conduct violated that statute); *Alexander* v. *Riga*, 208 F.3d 419, 431–32 (3d Cir. 2000) (explaining that malice and reckless indifference "refer not to the egregiousness of the landlord's conduct, but rather to the

The only arguable exception is the Sixth Circuit's unpublished decision in *Jeffries* v. *Wal-Mart Stores, Inc.*, 15 F. App'x 252 (6th Cir. 2001). Although that case did not expressly cite evidence of the defendant's knowledge, it did recognize that the defendant "must at least discriminate in the face of a perceived risk that its actions will violate federal law," and relied on "evidence of egregious conduct" only because it allowed "the jury to draw an inference about the defendant's malice or reckless indifference to the plaintiff's rights." *Id.* at 264 (internal quotation marks omitted). It did not hold that egregious conduct is always sufficient to sustain a punitive award. Moreover, the Sixth Circuit's published decisions have recognized that "the question for the availability of punitive damages is whether the defendants acted with malice or reckless indifference that their actions might violate a federal statute of which they were aware." *Preferred Props., Inc.* v. *Indian River Estates, Inc.*, 276 F.3d 790, 800 (6th Cir. 2001) (internal quotation marks omitted). There certainly is no conflict in the legal standards applied in the circuits that this Court needs to resolve.

In short, no "compelling reasons" exist to grant certiorari on the question whether egregious conduct

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landlord's knowledge that it may be acting in violation of federal law," and noting that there was no suggestion that the landlord "did not know that it was illegal . . . to discriminate on the basis of race in housing"); *Ogden* v. *Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) (concluding that the jury could infer from the employer's sexual-harassment policies that the plaintiff's manager "had knowledge of Title VII's proscriptions" and "acted in the face of a perceived risk that his actions would violate federal law"); *Passantino*, 212 F.3d at 516 (concluding that the jury could infer from the defendant's "continuing effort to cover up" its discrimination that it "could not have reasonably believed that its conduct was lawful").

can support an inference of malice or reckless indifference to federally protected rights. Sup. Ct. R. 10. That question is not presented here; the unpublished decision below did not address it; no court has adopted the rule WWNS proposes; and there is no conflict among the circuits for this Court to resolve. This case falls far short of the Court's standards for granting certiorari.

III. THE DECISION BELOW IS SUPPORTED BY AN INDEPENDENT AND ADEQUATE GROUND.

Finally, even if a question worthy of this Court's review were presented, this case would be an inappropriate vehicle because the decision below rests on an independent and adequate ground. As the court of appeals correctly held, the punitive damages award must be vacated regardless of whether WWNS presented sufficient evidence of malice or reckless indifference because the "jury instruction on punitive damages was also erroneous." Pet. App. 35a–36a. WWNS has not sought review of this alternative holding and has therefore waived any challenge to that aspect of the decision. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

As the court of appeals explained, the district court's *sua sponte* punitive damages instruction was woefully inadequate. DynCorp's proposed instruction correctly stated that punitive damages were available only if "a higher management official of DynCorp personally acted with malice or reckless indifference to WWNS's federally protected rights." J.A. 1186. The district court rejected this instruction and instead told the jury that it could award punitive damages if it found that "DynCorp, maliciously or with reckless

indifference discriminated against WWNS." *Id.* at 1645, 1966.

The instruction thus omitted *Kolstad*'s most critical teaching—that DynCorp must have acted in the face of a perceived risk that failing to renew WWNS's subcontract might violate federal law. It also left the jury free to impute *any* employee's motivations to DynCorp, rather than limiting the inquiry to managerial employees as *Kolstad* requires. See 527 U.S. at 543. As a result, the instruction left the jury "in complete ignorance of fundamentally controlling legal principles," to DynCorp's "serious prejudice." Pet. App. 37a (internal quotation marks and omission omitted).

Thus, even if WWNS had presented sufficient evidence to satisfy the *Kolstad* standard, the court of appeals still was right to vacate the punitive damages award because the jury was never asked to apply that standard. The existence of "other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the question presented" is fatal to WWNS's petition. Gressman, *supra* at 504. The "Court would not likely reach the question" on which WWNS seeks review, "and the decision would be robbed of any practical significance." *Id.* For this reason as well, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 10-11

IN THE
Supreme Court of the United States

WORLDWIDE NETWORK SERVICES, LLC, AND
WORLDWIDE NETWORK SERVICES INTERNATIONAL, FZCO,

Petitioners,

v.

DYNCORP INTERNATIONAL LLC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. Unblinkingly, DynCorp argues (Opp. 16) that certiorari should be denied because there is no "factual predicate" to conclude "that this case involves egregious discrimination." That, of course, proves precisely the problem and precisely why clarification by this Court of the proper punitive damages standard is needed. In 2010, a Fortune 1000 company still publicly and officially declares that there is nothing at all egregious about:

- its Vice-President for Business Development reading a letter in Ebonics like "the character on Fat Albert" at a dinner of corporate executives racially mocking WWNS's African American President ("we-ba going-ba, do-ba***"), while company Presidents and Vice-Presidents laughed "continuously," Pet. App. 13a, C.A. J.A. 935, 1023, 1025, 1029, 1152;

- its corporate Vice-President being presented with a T-shirt, reading "WWNS - I took them down, and all I got was this lousy T-Shirt," as a reward for his efforts to *destroy* a minority-owned business, Pet. App. 12a; C.A. J.A. 1139, and refusal to pay WWNS for completed work for which the federal government had already paid DynCorp, Pet. App. 11a; C.A. J.A. 301, 1274-1276;

- its Information Technology Manager in Iraq openly referring to WWNS officials as "nigger," "kaffir," and "bush baby," Pet. App. 12a; C.A. J.A. 872, 931;

- its same Manager stating "two to three times a week" that "the proper role of the black man was to go out and kill a lion, proving his manhood, at which point he should be put to work to feed his family * * * and mated with a woman," Pet. App. 12a; C.A. J.A. 874;

- its same Manager driving a WWNS manager from his workplace at gunpoint, Pet. App. 11a; C.A. J.A. 256, 885-888, and DynCorp stealing WWNS's non-managerial employees, Pet. App. 11a; C.A. J.A. 285-289, 937-938; or

- its Vice-President of Operations referring to Mr. Gray as "a stupid black motherf***r," Pet. App. 11a-12a.

That does not even exhaust what the majority acknowledged was the "abundant evidence of racial animus" in this case that nearly destroyed a business and put scores of employees out of work. Pet. App. 30a; C.A. J.A. 670-671, 792-793. But it certainly provided a predicate for the jury to conclude that "egregious or outrageous acts * * * support[ed] an inference of the requisite 'evil motive'" needed to support an award of punitive damages under this Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526, 538 (1999).

At least it would have if the court of appeals followed *Kolstad* and the same law as the First, Second, Third, Fifth, Sixth, Eighth, and Ninth Circuits. Pet. 13-14. Instead, the court of appeals applied the rule announced in its en banc decision in *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325

(4th Cir. 2003), that evidence of "severe or pervasive" discrimination alone will not support a jury inference of the requisite *mens rea* for punitive damages, *id.* at 333, 336. That confirms that Fourth Circuit law is on a different track from that of other circuits. Only this Court's review can restore uniformity to this important question of federal law.

DynCorp's repeated insistence (Opp. 2, 18, 19, 20) that the court of appeals did not decide whether that "egregious or outrageous" conduct would suffice to support the verdict cannot survive a straightforward reading of the opinion. The whole reason that the court of appeals, after having found "abundant evidence of racial animus," Pet. App. 30a, found it necessary to "comb the record" for *other* evidence of DynCorp's indifference to federal law is that the court concluded that its decision in *Ocheltree* controlled this case (Pet. App. 34a). And *Ocheltree* required the court to disregard the extraordinary evidence of overt racial discrimination and animus in this case and hunt for some completely different type of evidence to meet this Court's *Kolstad* standard.

Thus, whether the court of appeals properly vacated the punitive damages award because it "combed the record" and found nothing *other than* "abundant evidence of racial animus" of the caliber at issue here is precisely the question that this case presents and it is precisely the question on which the courts of appeals are in conflict.

DynCorp also complains (Opp. 17) that the court did not use the word "egregious." True. Some things go without saying.

Beyond that, the problem here was not, as DynCorp would have it (Opp. 2), that the court looked hard at the evidence of discriminatory conduct and concluded that it failed to cross some unarticulated line of egregiousness. Indeed, DynCorp cites nothing in the court of appeals' decision "disagree[ing] with WWNS's assessment of DynCorp's conduct as 'egregious.'" Opp. 2. Instead, DynCorp simply continues before this Court its effort, in Judge Duncan's words, to "pretty significantly sanitiz[e]" the record in this case. 4th Cir. Arg. Tr. at 7.

That will not work. The facts are as the jury found them, and the persistent problem with Fourth Circuit law and thus the decision here is that, having just spent page after page of its decision analyzing the abundant evidence of repeated, overt, and virulent racial discrimination and mockery unleashed on WWNS, the court then turned around and held as a matter of law that there was "no" relevant "evidence in the record" – absolutely "none" – that could support an inference of malice or reckless indifference. Pet. App. 35a, 37a. *Kolstad* says the opposite. So do all of the other circuits that have addressed the question. Pet. 13-14.[1]

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[1] DynCorp insists (Opp. 14-15) not only that there is nothing egregious about destroying a company just because it is owned by "nigger[s]," "kaffir[s]," and "bush bab[ies]," and racially mocking its African American president at a dinner of corporate executives, but also that such evidence does not even support liability in this case. Specifically, DynCorp argues that the court improperly attributed "racial animus by subordinate employees" to a single purportedly non-discriminatory decisionmaker. That argument is meritless, as the court of appeals held, because this case involved "a collective decision to

Finally, DynCorp's oft-repeated statement that WWNS conceded that the question presented was not decided (Opp. 2, 12, 15-16) is not at all fair or accurate. What the court of appeals did not consider or decide was whether the evidence of outrageous discriminatory conduct itself supported the punitive damages award – and whether they should have is the question presented. That is very different from saying that the court did not consider the legal question of that evidence's relevance, as DynCorp contends. The legal relevance of the discriminatory conduct was specifically argued to the court, WWNS C.A. Br. 40-41, and the court's reliance on *Ocheltree* as on-point and controlling precedent rejecting WWNS's argument proves that the court did exactly what the petition says it did. There is simply no other way to read the court's extension of *Ocheltree* to a record with such abundant and extensive evidence of virulent racial animus at the highest corporate levels of DynCorp.

2. The conflict between Fourth Circuit law and the law of this Court is inescapable. Although DynCorp suggests (Opp. 18) that *Kolstad* left open the question of whether evidence of egregious racial

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terminate" WWNS made by high-level executives who were themselves infected with racial animus. Pet. App. 24a, 25a & nn. 9, 10; *see also id.* at 24a ("We disagree with the initial premise that only Cashon made the decision."). The argument is also barred because it seeks to alter, not defend, the judgment below. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 n.11 (1975) (declining to consider argument that was not "the subject of a cross-petition," yet "would alter the judgment of the Court of Appeals, * * * rather than providing an alternative ground for affirming it").

discrimination alone could support a punitive damages award, *Kolstad* did no such thing. Quite the opposite, this Court unambiguously held that "egregious misconduct *is* evidence of the requisite mental state," 527 U.S. at 535 (emphasis added), and that "evidence of an employer's egregious behavior would provide one means of satisfying the plaintiff's burden to 'demonstrat[e]' that the employer acted with the requisite 'malice or . . . reckless indifference,'" *id.* at 539 (alteration and omission in original) (citation omitted). *See also id.* at 538 ("To be sure, egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive.'"); *id.* at 539 ("malice . . . may be implied from outrageous conduct") (omission in original).

DynCorp's effort to diminish the circuit conflict fares no better. Contrary to DynCorp's argument, other courts do not require that evidence of egregious conduct be supplemented by particularized evidence of knowledge of the law. They instead hew faithfully to *Kolstad* and make the egregiousness of the conduct an independent and sufficient basis for satisfying the punitive damages standard. The rule in the Second Circuit, for example, is that punitive damages can be awarded based on evidence "(1) that the defendant 'discriminate[d] in the face of a perceived risk that its actions . . . violate[d] federal law,' *or* (2) of 'egregious or outrageous acts' that 'may serve as evidence supporting an inference of the requisite evil motive.'" *United States v. Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005) (alterations and omission in original) (citations and some internal quotation marks omitted).

The law of the First, Third, Fifth, Sixth, and Ninth Circuits also disagrees with that of the Fourth Circuit. *See DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001) ("'the willful mistreatment of persons based on their heritage' was a clear 'example of callous indifference,'" and therefore sufficient to support punitive damages, because "[t]he extent of federal statutory and constitutional law preventing discrimination on the basis of ethnicity or race suggests that defendants had to know that such discrimination was illegal"); *Alexander v. Riga*, 208 F.3d 419, 431-432 (3d Cir. 2000) (evidence was sufficient to support punitive damages where defendant "persistently refused to deal with African-Americans, as opposed to whites, and represented that an apartment was not available for inspection or rental, when it was," since defendant could be presumed to know "that it was illegal, and had been for thirty years, to discriminate on the basis of race in housing"); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515 (9th Cir. 2000) (in *Kolstad*, this Court "made clear that * * * egregious conduct [can] be evidence of intent to break the law"); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 280, 286 (5th Cir. 1999) (manager "manifested the requisite malice or reckless disregard of Deffenbaugh's federal rights" by failing to contradict statement that plaintiff would "'never move up with the company being associated with a black man'" and subsequently pursuing "a series of pretextual disciplinary actions against Deffenbaugh"); *Jeffries v. Wal-Mart Stores, Inc.*, 15 F. App'x 252, 264, 2001 WL 845486, at *9 (6th Cir. 2001) ("Although egregious conduct is not a prerequisite for a punitive damages award, a plaintiff

can introduce evidence of egregious conduct in order for the jury to draw an inference about the defendant's malice or reckless indifference to the plaintiff's rights.").

The law in the Eighth Circuit is the same. *See Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1048 (8th Cir. 2002) (punitive damages issue properly submitted to jury where defendant "occasionally took 'special efforts' on behalf of white applicants" and "there was evidence that [defendant] may have passed over qualified internal black candidates in favor of new college graduates who were white"); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) ("[A] reasonable jury could have found Hudson's behavior 'sufficiently abusive' to manifest the requisite malice or reckless disregard for Ogden's rights.").

DynCorp notes (Opp. 23 n.4) that, in *Ogden*, there was also direct evidence of the employer's knowledge of federal law. *See Ogden*, 214 F.3d at 1010. But the Eighth Circuit's subsequent decision in *Ross* affirmed the submission of punitive damages to the jury on the basis of egregious conduct alone and thus did not require direct evidence of the defendant's mental state. To the extent, however, that *Ogden* suggests that the law of the Eighth Circuit requires direct evidence, that would simply deepen the circuit conflict, making this Court's review all the more critical.

Similarly, DynCorp's reliance (Br. 22) on *Hysten v. Burlington Northern Santa Fe Railway Co.*, 530 F.3d 1260 (10th Cir. 2008), is misplaced. Assuming

that case adopts the rule that egregious or outrageous discrimination alone is not enough, and thus concurs in the rule of law adopted by the Fourth Circuit, that argument, like DynCorp's reading of *Ogden*, would simply widen the scope of the circuit conflict and compound the need for this Court's review.

Finally, unable to deny the conflict, DynCorp attempts to change the subject, arguing (Opp. 21) that other courts have not held that "egregious conduct *always* supports a punitive damages award." That is indeed true. It is also irrelevant. WWNS's point has never been that the jury *had* to award punitive damages. The question instead is whether the law permits the jury's discretionary decision to award such damages to stand given the evidence of egregious or outrageous discrimination in the record. Had this case arisen in the First, Second, Third, Fifth, Sixth, Eighth, or Ninth Circuits, the answer would have been yes. But the answer was no in the Fourth Circuit. That is the problem.

3. Finally, DynCorp's contention (Opp. 24-25) that the judgment is supported by an alternative, unchallenged ruling is simply wrong. The identical legal error pervaded both aspects of the court's punitive damages analysis (the substantive standard and the jury instruction). And the unqualified Question Presented captures the error in both of its manifestations.

The Question Presented asks "[w]hether evidence of overt and egregious intentional discrimination on the basis of race can support an inference that the

defendant acted with malice or with reckless indifference to the plaintiff's federally protected rights." Pet. i. That legal error was just as critical to the court of appeals' holding that the jury instruction on punitive damages was erroneous as it was to the court's articulation and application of the substantive punitive damages standard. Pet. App. 37a (in deciding "whether DynCorp was prejudiced by the instruction, *we note again that WWNS has not identified any evidence that DynCorp suspected that terminating the CivPol Subcontract might violate federal law, and we found no such evidence in the record*") (emphasis added).[2] That ruling thus is not an independent ground for sustaining the judgment; it is the Question Presented twice over.

[2] A showing of prejudice was required because DynCorp waived its objection to the jury instruction in district court and, thus, the court of appeals was reviewing for plain error. Pet. App. 36a.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the judgment should be summarily reversed in light of this Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).[3]

Respectfully submitted,

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September 7, 2010

[3] Because a portion of the court of appeals' opinion was inadvertently omitted from the petition appendix, the court's opinion has been reproduced in full as an addendum to this brief. We apologize for the error.

ADDENDUM

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2108

WORLDWIDE NETWORK SERVICES, LLC;
WORLDWIDE NETWORK SERVICES,
INTERNATIONAL, FZCO,

Plaintiffs – Appellees,

v.

DYNCORP INTERNATIONAL, LLC,

Defendant – Appellant.

CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA,

Amicus Supporting Appellant,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW; THE NATIONAL URBAN LEAGUE,

Amici Supporting Appellees.

No. 08-2166

WORLDWIDE NETWORK SERVICES, LLC; WORLDWIDE NETWORK SERVICES, INTERNATIONAL, FZCO,

Plaintiffs – Appellants,

v.

DYNCORP INTERNATIONAL, LLC,

Defendant – Appellee.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amicus Supporting Appellee,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; THE NATIONAL URBAN LEAGUE,

Amici Supporting Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:07-cv-00627-GBL-JFA)

Argued: September 22, 2009 Decided: February 12, 2010

Before NIEMEYER and DUNCAN, Circuit Judges, and James P. JONES, Chief United States District Judge for the Western District of Virginia, sitting by designation

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Affirmed in part and reversed in part by unpublished opinion. Judge Duncan wrote the majority opinion, in which Judge Niemeyer concurred as to Part II.D(1)&(2), and in which Judge Jones concurred as to Parts II.A, II.B, and II.C. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part. Judge Jones wrote a separate opinion concurring in part and dissenting in part.

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Unpublished opinions are not binding precedent in this circuit.

DUNCAN, Circuit Judge:

Worldwide Network Services, Inc. ("WWNS") sued DynCorp International, LLC ("DynCorp") for discrimination under 42 U.S.C. § 1981 and various torts after DynCorp terminated a subcontract with WWNS related to government work in Iraq and Afghanistan. Upon finding DynCorp liable, a jury awarded WWNS $10 million in punitive damages. On appeal, DynCorp challenges three evidentiary rulings, two jury instructions, and the district court's denial of DynCorp's motions under Federal Rule of Civil Procedure 50. For the reasons stated below, we affirm in part and reverse in part, vacating the award of punitive damages.

I.

A.

DynCorp contracted with the United States Department of State to provide services in Iraq and Afghanistan for the Worldwide Personal Protective Services program ("WPPS") and Civilian Police program ("CivPol"). WPPS protects United States personnel and certain foreign officials abroad. CivPol provides law enforcement, criminal justice, and other assistance to societies undergoing post-conflict reconstruction. DynCorp carried out the services through its International Technical Services Division ("ITS Division"). The CivPol Program Manager was Richard Cashon.

In February 2004 DynCorp entered into subcontracts with WWNS to provide communication

and information-technology services for WPPS and CivPol ("WPPS Subcontract" and "CivPol Subcontract"). DynCorp then issued task orders that would expire between August and October 2006.[1] WWNS had been designated a Small Disadvantaged Business by the United States Small Business Administration under the Small Business Act of 1953 § 8(a), 15 U.S.C. § 637(a), because its owners Walter Gray and Reginald Bailey are African American. WWNS was awarded the WPPS and CivPol Subcontracts after well-known entrepreneur Ross Perot introduced Gray and Bailey to Steven Cannon, who was then President and CEO of DynCorp.

B.

The quality of WWNS's work remains unclear. In January 2006 the State Department twice complained about WWNS and threatened to terminate DynCorp as a result. One complaint stated, "WWNS's technical performance has in general been inadequate to the point where it has disrupted critical communications in the field." J.A. 117. Also, DynCorp had previously complained to WWNS about radio failures. Notwithstanding, Cashon gave WWNS glowing evaluations in January and March 2006. His March evaluation deemed WWNS "excellent" or "good" in every category and stated that DynCorp would hire WWNS again.

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[1] Regarding "task orders," see 48 C.F.R. § 16.501-1 ("Task order contract means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.").

After receiving the State Department complaints, DynCorp investigated WWNS's work and generated two internal reports. First, the CivPol Iraq IT Evaluation ("Iraq Report") completed by June 19, 2006, evaluated WWNS's work at the Baghdad Hotel, the CivPol headquarters for Iraq. Second, the Middle East Information Technology Tiger Team Site Assessment Report ("Tiger Report") dated July 22, 2006, evaluated WWNS's work at locations in Afghanistan. The reports' principal author was Christopher Kellogg ("Kellogg"), but other DynCorp employees also contributed. Each report was highly critical of WWNS.

C.

DynCorp's relationship with WWNS began to deteriorate in December 2005 when DynCorp hired new executives in the ITS Division. Robert Rosenkranz became President, Richard Walsh became Vice-President of Operations, Walter Merrick became Deputy CivPol Program Manager, and Leon DeBeer became Information-Technology Manager. With these arrivals, DynCorp began excluding WWNS personnel from planning meetings, ignoring emails from WWNS managers in Iraq, and failing to provide WWNS employees with needed access to worksites and equipment. In particular, DynCorp failed to provide WWNS employees with security badges needed to move around in Iraq.

The tension between DynCorp and WWNS reached breaking point in summer 2006. On July 17, 2006, Cannon resigned as President and CEO of DynCorp. Immediately thereafter, DynCorp decided

not to issue further task orders under the CivPol Subcontract or to renew the subcontract. DynCorp alleges that Cashon was solely responsible for this decision. Cashon's testimony and other evidence, however, indicate that Cashon, Rosenkranz, Merrick, and Walsh made the decision collectively.

Prior to the CivPol Subcontract's expiration, DynCorp engaged in certain questionable behavior toward WWNS. For example, DynCorp had Charles Jones, WWNS's Iraq Country Manager, escorted from his workplace at gunpoint. DynCorp then recruited WWNS's non-managerial employees in Iraq and Afghanistan to join DynCorp or EDO Corporation ("EDO Corp"), the non-minority-owned company that would eventually replace WWNS. Moreover, Walsh directed DynCorp's accounting department to stop processing or paying invoices from WWNS for work already completed.[2] In stopping payment, DynCorp did not provide WWNS with notice or the opportunity to cure alleged deficiencies in the work. Because almost all of WWNS's business came from DynCorp, DynCorp's actions in ending the CivPol Subcontract, recruiting WWNS's employees, and stopping payment on its invoices nearly destroyed WWNS.

D.

Beyond the above questionable behavior, the record contains evidence of DynCorp's racial animus toward WWNS. John Mack, a consultant for DynCorp, testified that Walsh called Gray "a stupid

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[2] In February 2008 DynCorp paid WWNS over $3.3 million for outstanding invoices that dated back two years. It offered no explanation for the delay.

black mother . . . ." J.A. 1723. Also, Rosenkranz terminated DynCorp's only minority executive Richard Spencer, a Latino, who testified to "some underlying discriminatory things" behind his termination. J.A. 1019.

DeBeer in particular expressed racial animus, often calling Gray "nigger" and "kaffir."[3] J.A. 872. According to Jones, DeBeer expressed "[t]wo to three times a week" that "people of Anglo descent . . . had made a grave error" because they "had taken the black man as a youth and attempted to clothe him and send him to school" and that "the proper role of the black man was to go out and kill a lion, proving his manhood, at which point in time he should be put to work to feed his family . . . and mated with a woman so that he would have more children, who could then be put to work feeding their family." J.A. 874. Jones said DeBeer predicted that DynCorp's relationship with WWNS would end and explained that "that ending was being manufactured by . . . factions within DynCorp" that opposed Cannon. J.A. 869. Jones noted that DeBeer was "consumed by . . . hatred" for "Cannon and everybody associated with him." J.A. 873.

Finally, DynCorp celebrated WWNS's demise during a company dinner in October 2006 hosted by Rosenkranz. At the dinner, Walsh received a T-shirt that read, "WWNS - I took them down, and all I got was this lousy T-Shirt." J.A. 1139. After Walsh put on the T-shirt, DynCorp employee Bill Cavanaugh

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[3] The term "kaffir" is "[u]sed especially in southern Africa as a disparaging term for a Black person." American Heritage Dictionary of the English Language 952 (4th ed. 2006).

presented a letter purportedly from Gray to Walsh and read it aloud in mock Ebonics. According to a DynCorp executive, Rosenkranz "was laughing his ass off." J.A. 1029.

E.

In October 2006 WWNS brought this action against DynCorp and EDO Corp in the District of Columbia. The case was later transferred to the Eastern District of Virginia. The complaint asserted claims of discrimination under 42 U.S.C. § 1981 (Count 1); tortious interference with contract (Count 3); tortious interference with prospective economic advantage (Count 4); civil conspiracy (Count 5); conspiracy under the Virginia Conspiracy Act, Va. Code Ann. § 18.2-499 (Count 6); breach of the CivPol Subcontract (Count 7); breach of the WPPS Subcontract (Count 8); and breach of the implied covenant of good faith and fair dealing (Count 9).[4] In turn, DynCorp filed counterclaims of breach of the CivPol Subcontract, breach of the WPPS Subcontract, and breach of warranty. WWNS and DynCorp proceeded to trial by jury in May 2008. WWNS and EDO Corp settled on the eve of trial.

Before trial, DynCorp planned to introduce the Iraq and Tiger Reports into evidence through Kellogg, who would testify about his observations during DynCorp's internal investigation. However, the district court granted WWNS's motion to exclude the testimony, saying the reports contained hearsay. The court also found the reports and Kellogg's proposed testimony inadmissible under Federal Rule

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[4] Count 2 was dismissed before trial.

of Evidence 701, which prohibits lay witnesses from giving expert testimony.

During trial, DynCorp objected to Spencer's testimony about his termination by Rosenkranz based on Federal Rules of Evidence 401 and 403.[5] The district court overruled this objection, reasoning that Spencer's testimony was "relevant to the issue of pretext as it demonstrates DynCorp's corporate attitude toward minorities and provides insight into what factors contributed to DynCorp's decision to terminate its relationship with WWNS." J.A. 1891. Later, DynCorp tried to offer rehabilitative testimony from Jasbir Gill, a Sikh employee at DynCorp. The court held, "Well, I'll allow Ms. Gill to testify about her interaction with Mr. DeBeer, and whether or not he used any racial slurs in her presence," but "[h]ow she was treated by the company is irrelevant." J.A. 1568.

Finally, DynCorp objected to the testimony of John Mack. When WWNS called him on rebuttal, Mack testified that Walsh called Gray "a stupid black mother . . . ." J.A. 1723. About ten questions later, DynCorp objected and moved to strike because WWNS had failed to notify DynCorp about Mack's testimony under Federal Rule of Civil Procedure

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[5] Rule 401 defines "relevant evidence" to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Fed. R. Evid. 401. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

26(e), which requires parties to supplement discovery when new evidence surfaces. During a bench conference, WWNS admitted its failure to notify DynCorp pursuant to Rule 26(e). Nonetheless, the court denied DynCorp's motion to strike and instead instructed the jury to take into consideration WWNS's failure to notify DynCorp about Mack's testimony.

Following the close of evidence, the district court granted WWNS's motion under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law regarding unpaid invoices totaling almost $2.8 million. The court then instructed the jury.

Regarding the § 1981 discrimination claim, DynCorp had requested an instruction based on *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004). The proposed instruction stated:

> DynCorp asserts that the person who made the decision not to renew or extend the WWNS CIVPOL subcontract or task orders was not improperly motivated by discrimination. To the extent that WWNS rests its discrimination claim upon the discriminatory motivations of a subordinate employee, WWNS must show by the greater weight of the evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for DynCorp.

J.A. 1185. The district court refused to give this instruction, explaining: "I don't think I need to. I

think you can prove that they [DynCorp] were responsible or not, and the jury doesn't have to specify which person did what." J.A. 1656. Instead, the court instructed: "WWNS must prove that DynCorp intentionally discriminated against WWNS. That is, the race of WWNS's owners must be proven to have been a motivating factor in DynCorp's decision not to renew WWNS's CIVPOL subcontract or issue further task orders thereunder." J.A. 1762.

Regarding punitive damages, the district court gave the following instruction:

> [Y]ou may award punitive damages if WWNS . . . [has] shown by clear and convincing evidence that DynCorp maliciously, or with reckless indifference, discriminated against WWNS, and/or that DynCorp tortiously interfered with the contracts between [WWNS] and its employees, and/or conspired with EDO to interfere with the contracts between [WWNS] and its employees, and/or that DynCorp tortiously interfered with WWNS's prospective economic advantage.

J.A. 1771. By contrast, DynCorp had requested an instruction that began, "WWNS claims the acts of DynCorp were done with malice or reckless indifference *to WWNS's federally protected rights.*" J.A. 1186 (emphasis added).

After several days of deliberation, the jury returned a split verdict. It found in DynCorp's favor on Counts 4-6 and one of DynCorp's counterclaims, awarding DynCorp $178,000 for breach of the WPPS

Subcontract. The jury found in WWNS's favor on all other claims. It awarded WWNS compensatory damages of $3.42 million for Count 1 (§ 1981 discrimination), $83,000 for Count 3 (tortious interference with contract), $558,510.42 for Count 7 (breach of CivPol Subcontract), $42,092.62 for Count 8 (breach of WPPS Subcontract), and $720,000 for Count 9 (breach of implied covenant of good faith and fair dealing). The jury also awarded WWNS $10 million in punitive damages.

The district court denied DynCorp's renewed Federal Rule of Civil Procedure 50(b) motion for judgment as a matter of law, Rule 59(a) motion for a new trial, and Rule 59(e) motion to alter or amend the judgment. This appeal followed. We have jurisdiction under 28 U.S.C. §§ 1331 and 1291.[6]

II.

On appeal, DynCorp asserts (1) that the district court should have given DynCorp's proposed jury instruction regarding the § 1981 discrimination claim; (2) that DynCorp should have been awarded judgment as a matter of law on that claim; (3) that Kellogg's testimony and the Iraq and Tiger Reports should have been admitted; (4) that Spencer's testimony should have been excluded; (5) that Mack's testimony should have been struck; (6) that the jury instruction on punitive damages for § 1981

[6] WWNS filed a cross-appeal, arguing that Alexis Maniatis's proposed testimony calculating WWNS's lost profits was erroneously excluded. Because we do not remand for another trial to determine compensatory damages, we do not reach WWNS's cross-appeal.

discrimination was erroneous; and (7) that the record does not support punitive damages for § 1981 discrimination.[7] We consider each contention below.

A.

We first consider DynCorp's challenge to the district court's failure to give its proposed jury instruction regarding the § 1981 discrimination claim. "A district court commits reversible error in refusing to provide a proffered jury instruction only when the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Passaro*, 577 F.3d 207, 221 (4th Cir. 2009) (internal quotations omitted). "We review the district court's decision to give or refuse to give a jury instruction for abuse of discretion." *Id.* "Moreover, we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *Id.* (internal quotations omitted).

Because DynCorp's proposed instruction regarding the § 1981 claim was based on *Hill*, in reviewing the district court's failure to give that instruction we must consider *Hill*'s applicability to this case. Ethel Hill was a Lockheed mechanic who

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[7] DynCorp also asserts that the award of punitive damages violates the Due Process Clause, but we do not reach this issue because we vacate that award.

repaired aircraft at military bases under contracts between Lockheed and the United States. Her work was overseen by a "lead person" who reported to her supervisor. Lockheed also assigned a safety inspector to each jobsite who reported to the lead person but lacked supervisory authority. Hill received three written reprimands based on errors discovered by her jobsite's safety inspector and was terminated pursuant to company policy. Hill alleged discrimination by that inspector, who had often called her a "damn woman" and "useless old lady" who should retire. *Hill*, 354 F.3d at 283.

Hill sued Lockheed under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"), arguing that but for the inspector's discrimination she would have received fewer reprimands and avoided termination. The district court granted summary judgment to Lockheed on the ground that the inspector's bias could not be imputed to Lockheed. *Hill*, 354 F.3d at 283. In affirming, we announced this rule:

> [T]o survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

Id. at 291 (emphasis added). Accordingly, we found summary judgment appropriate because Hill had not shown evidence that the safety inspector could be considered the actual decisionmaker or the one principally responsible for the decision to terminate Hill. *Id.* at 297-98.

DynCorp argues that the *Hill* rule governs the case now before us. After carefully studying *Hill*, we disagree. In that case, the ultimate question was whether Lockheed intentionally discriminated in deciding to terminate Hill. This required evidence that her "'protected trait . . . actually motivated the employer's decision,'" that is, that the trait "'actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome.'" *Id.* at 286 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000)). Accordingly, we considered "who is a 'decisionmaker' for purposes of discrimination actions brought under Title VII and the ADEA." Hill, 354 F.3d at 286. We said agency principles guided our decision because both statutes defined "employer" to include "any agent" thereof. *Id.* at 287; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-65 (1998). We then noted *Ellerth*, where the Supreme Court explained that "[t]he supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control," and that "tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762. Therefore, the Court said that "a tangible employment action taken by the

supervisor becomes for Title VII purposes the act of the employer." *Id.*

The case most important to our *Hill* decision was *Reeves*. Roger Reeves supervised assembly-line workers for Sanderson Plumbing Products, Inc., which made toilet seats and covers. Upon learning that Reeves made various mistakes, Powe Chestnut, the director of manufacturing and the husband of company president Sandra Sanderson, told Sanderson that Reeves should be fired. Sanderson followed his recommendation. Reeves then sued under the ADEA, alleging that his termination resulted from discrimination by Chestnut, who had often showed discriminatory animus toward him. *Reeves*, 530 U.S. at 138. The Supreme Court found that Reeves had overcome judgment notwithstanding the verdict because, although Sanderson "made the formal decision to discharge" Reeves, Chestnut "was principally responsible for" and "the actual decisionmaker behind his firing." *Id.* at 151-52. Reeves had produced evidence that Chestnut "exercised 'absolute power' within the company." *Id.* at 152.

Ultimately, *Reeves*'s rationale dictated the rule that *Hill* announced. *See Hill*, 354 F.3d at 288-89 ("*Reeves* informs us that the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer for an adverse employment action, so long as . . . the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." (quoting *Reeves*, 530 U.S. at 151-52)). For our purposes, *Reeves* also clarifies the *Hill* rule.

Reeves distinguishes between the "formal decisionmaker," which under *Ellerth* would be the person authorized to make the relevant decision, and "subordinate" employees who lack this authority, such as Chestnut or the safety inspector in *Hill*. Accordingly, we believe the term "subordinate employee" in the *Hill* rule invokes that distinction. *Hill*, 354 F.3d at 291.

Using this interpretation, and assuming for purposes of this appeal that *Hill* applies under § 1981, we conclude that DynCorp can take no comfort from *Hill* on the facts before us. DynCorp relies on *Hill* to argue that, because it alleges that Cashon was solely responsible for the decision to terminate the CivPol Subcontract, the jury should not have been allowed to consider the racial animus of anyone other than Cashon. We note, however, that *Hill* does not enable DynCorp to self-select the decisionmaker whose motives are the purest. Furthermore, we find *Hill* inapplicable for two separate reasons.

First, the *Hill* rule's initial premise, namely, that the plaintiff "rests a discrimination claim . . . upon the discriminatory motivations of a subordinate employee," assumes that a formal decisionmaker can be identified. *Id.* at 291. In this case, however, WWNS and DynCorp offered conflicting evidence regarding who had authority to terminate the CivPol Subcontract. Cashon testified to having this authority but also admitted that he answered to Rosenkranz regarding his decision. Moreover, other evidence indicated that Cashon, Merrick, Rosenkranz, and Walsh were authorized to make that decision collectively. Significantly, Walsh was the

one who directed DynCorp's accounting department to stop payment to WWNS for completed work. By contrast, this problem of identification was absent from *Hill* and *Reeves*, where none debated who had formal decisionmaking authority.

Second, even assuming that only Cashon could be considered the formal decisionmaker, we are unwilling to conclude that Walsh and Rosenkranz, who supervised Cashon, should be treated like the *Hill* and *Reeves* subordinate employees who lacked authority over the formal decisionmaker. Because *Hill* thus does not apply to this case, we conclude that the district court's refusal to give DynCorp's proposed instruction was not an abuse of discretion.[8]

B.

Next, we consider DynCorp's challenge to the district court's denial of DynCorp's renewed Rule 50(b) motion for judgment as a matter of law on the § 1981 claim. "We review de novo the grant or denial of a motion for judgment as a matter of law." *Robinson v. Equifax Info. Servs, LLC*, 560 F.3d 235, 240 (4th

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[8] We note as well that DynCorp's proposed jury instruction was "substantially covered by the court's charge to the jury." Passaro, 577 F.3d at 221. As mentioned, the district court instructed that "the race of WWNS's owners must be proven to have been a motivating factor in DynCorp's decision not to renew WWNS's CIVPOL subcontract or issue further task orders thereunder." J.A. 1762. Following this instruction's clear import, the jury could not have considered evidence of racial bias regarding DynCorp employees that neither made nor had authority to make that decision. Thus, DynCorp's proposed instruction differed from the actual one only by wrongly insinuating that just one person could have made or been responsible for the decision to terminate the CivPol Subcontract.

Cir. 2009) (internal quotations omitted). "Judgment as a matter of law is proper when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." *U.S. ex rel. DRC, Inc. v. Custer Battles*, LLC, 562 F.3d 295, 305 (4th Cir. 2009) (internal quotations omitted); *see also Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008) ("A court may award judgment as a matter of law only if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party."). On this issue, we must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002).

In this case, § 1981 liability required proof that race actually motivated DynCorp's decision to terminate the CivPol Subcontract, that is, that race "actually played a role in the . . . decisionmaking process and had a determinative influence on the outcome." *Reeves*, 530 U.S. at 141. DynCorp alleges that only Cashon made the decision to terminate the CivPol Subcontract. Accordingly, DynCorp concludes that all other DynCorp executives' alleged racial animus must be ignored under Hill. In that light, DynCorp asserts that the verdict cannot stand. We disagree with the initial premise that only Cashon made the decision.[9] The record contains sufficient

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[9] We do not dispute the characterization in Judge Niemeyer's opinion, dissenting in part, that Cashon had authority to terminate the CivPol Subcontract. However, that opinion fails to reckon with Cashon's own testimony that he made the decision collectively with Merrick, Rosenkranz, and

evidence from which a reasonable jury could conclude that Cashon, Rosenkranz, Merrick, and Walsh made a collective decision to terminate the CivPol Subcontract. The record also contains evidence that Rosenkranz and Walsh harbored racial animus against Gray and Bailey. This evidence includes Walsh's racial slur, Spencer's termination by Rosenkranz, Walsh stopping payments to WWNS, and the checkered October 2006 dinner celebrating WWNS's misfortune.[10] Therefore, sufficient evidence of discrimination was presented for § 1981 liability.

Moreover, we note that WWNS presented adequate evidence to establish § 1981 liability through the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (extending *McDonnell Douglas* to § 1981 cases), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Under this analysis, the plaintiff carries an initial burden to establish a prima facie case of discrimination. A company alleging discriminatory contract termination may carry this burden by showing that (1) the defendant terminated a contract with it, (2) it was within a protected class, (3) its performance under the contract met the defendant's legitimate expectations, and (4) the

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Walsh – the discriminatory animus of at least Rosenkranz and Walsh having been set out.

[10] To the extent that Judge Niemeyer's opinion argues that, but for evidence about DeBeer, the record contained insufficient evidence to establish § 1981 discrimination, we note that that opinion fails to account for Walsh's otherwise unexplained decision to stop payments to WWNS.

defendant instead contracted with a company not in a protected class. *See Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007). Once the prima facie case has been established, the burden shifts to the defendant "to articulate a legitimate, nondiscriminatory reason" for the contract termination. *Id.* (internal quotations omitted). Once the defendant carries this burden of production, the burden shifts back to the plaintiff to prove that the defendant's stated reasons "were not its true reasons, but were a pretext for discrimination." *Id.* (internal quotations omitted). At this point, "the *McDonnell Douglas* framework – with its presumptions and burdens – disappear[s] . . . and the sole remaining issue [i]s discrimination vel non." *Reeves*, 530 U.S. at 142-43 (internal quotations omitted).

WWNS established a prima facie case of discrimination by showing that (1) DynCorp terminated the CivPol Subcontract, (2) WWNS had been designated a Small Disadvantaged Business by the SBA because Gray and Bailey are African American, (3) Cashon's glowing evaluations of WWNS in January and March 2006 rated WWNS "excellent" or "good" across the board and stated that DynCorp would hire WWNS again, and (4) EDO Corp. was not minority-owned. In turn, DynCorp articulated a legitimate, nondiscriminatory reason for terminating the CivPol Subcontract. Cashon testified that the reason was WWNS's poor performance. We believe a reasonable jury could have concluded that DynCorp's stated reason was merely a pretext for discrimination. For example, the jury might have disbelieved Cashon's testimony about DynCorp's stated reason because Cashon himself had given

WWNS glowing evaluations. Therefore, we affirm the district court's denial of DynCorp's Rule 50(b) motion regarding the § 1981 claim.

C.

We next consider three evidentiary rulings that DynCorp challenges. We review each for abuse of discretion. *United States v. Basham*, 561 F.3d 302, 325 (4th Cir. 2009).

1.

First, DynCorp argues that the district court committed reversible error by excluding Kellogg's testimony and the Iraq and Tiger Reports. This evidence was excluded under Federal Rule of Evidence 701, which "forbids the admission of expert testimony dressed in lay witness clothing." *United States v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006). Kellogg's excluded testimony and the Iraq and Tiger Reports were technical evaluations of WWNS's performance. Discussed topics include whether WWNS's chosen method of encrypting wireless communication provided enough security. We believe such matters are well beyond the scope of permissible lay testimony under Rule 701. *See Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (noting that Rule 701 "generally does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness" (internal quotations omitted)). Therefore, we conclude that the district court's decision to exclude that evidence was not an abuse of discretion.

2.

Second, DynCorp challenges the district court's failure to exclude Spencer's testimony about his termination by Rosenkranz under Federal Rules of Evidence 401 and 403. The court below reasoned that Spencer's testimony was "relevant to the issue of pretext as it demonstrates DynCorp's corporate attitude toward minorities and provides insight into what factors contributed to DynCorp's decision to terminate its relationship with WWNS." J.A. 1891. We believe that Spencer's testimony was indeed relevant because of Rosenkranz's apparent participation in DynCorp's decision to terminate the CivPol Subcontract. Moreover, we believe this probative value outweighed any danger of undue prejudice. Thus, we affirm the district court's decision to allow Spencer's testimony.

3.

Finally, DynCorp challenges the district court's failure to strike Mack's testimony that Walsh called Gray "a stupid black mother . . . ." J.A. 1723. Federal Rule of Civil Procedure 26(e) provides that a party who has made a disclosure or responded to an interrogatory "must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). Mack's allegation became known to WWNS several days before trial, but DynCorp was not made aware of it until Mack testified at trial. WWNS thus clearly violated Rule 26(e), which it does not dispute.

Upon discovering that WWNS had not disclosed Mack's allegation, DynCorp objected and moved to strike because of WWNS's Rule 26(e) violation. The district court denied this motion, stating: "[T]he difficulty that I have is, you're asking me to tell the jury to disregard the hot poker that has just been put in front of their face. I don't think I can undo it that way." J.A. 1730. Instead, the court instructed the jury to take into consideration WWNS's failure to notify DynCorp about Mack's allegation. DynCorp later moved for a new trial, arguing that Mack's testimony should have been struck, but the court denied this motion.

Federal Rule of Civil Procedure 37(c)(1) provides: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). WWNS asserts that the Rule 26 violation was harmless but concedes that no substantial justification existed.

We have said that a court determining harmlessness under Rule 37(c)(1) should consider five factors:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's

explanation for its failure to disclose the evidence.

S. States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003). Based on these factors, we believe WWNS's Rule 26 violation was indeed harmless. Although DynCorp was surprised by Mack's testimony, the trial continued undisturbed. Moreover, the record contains abundant evidence of racial animus aside from Mack's testimony. This includes Spencer's termination by Rosenkranz, the racially charged October 2006 dinner celebrating WWNS's misfortune, and Walsh directing DynCorp's accounting department to stop paying WWNS for work already completed. We therefore decline to reverse on this ground.

D.

Finally, we consider alleged errors regarding the $10 million punitive-damages award. DynCorp argues that punitive damages for the § 1981 claim are unsupported by the record and that the jury instruction on that issue was erroneous.

1.

We begin by considering the district court's denial of DynCorp's renewed Rule 50(b) motion for judgment as a matter of law with regard to WWNS's prayer for punitive damages for the § 1981 claim. We review this decision de novo. *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 442-43 (4th Cir. 2000).

A plaintiff who prevails under § 1981 "is entitled under the common law to punitive damages . . . for conduct . . . exhibiting malice, an evil motive, or recklessness or callous indifference to a federally protected right." *Id.* at 441 (internal quotations omitted). The Supreme Court developed this standard in *Smith v. Wade*, 461 U.S. 30 (1983), for actions under 42 U.S.C. § 1983. Congress later adopted the standard in the Civil Rights Act of 1991, which allows punitive damages in Title VII actions where the employer discriminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Interpreting this statute, the Supreme Court held that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). Accordingly, the Court held that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. Because § 1981a was intended to mirror *Smith*, we have held that "any case law construing the punitive damages standard set forth in § 1981a, for example *Kolstad*, is equally applicable to clarify the common law punitive damages standard with respect to a § 1981 claim." *Lowery*, 206 F.3d at 441. Therefore, upon reviewing § 1981 punitive damages, we have required evidence that the defendant acted "in the face of a perceived risk that [its] decision would violate federal law." *Id.* at 443.

Regarding this requirement, *Kolstad* noted hypotheticals that are particularly relevant to the case before us. The Supreme Court explained:

> There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized.

Kolstad, 527 U.S. at 536-37. Accordingly, even a defendant who discriminates while intending to cause injury might escape liability for punitive damages under § 1981 if he thought his conduct was lawful. This informs our remark that punitive damages are "an extraordinary remedy" and "not every lawsuit under section 1981 calls for submission of this extraordinary remedy to a jury." *Stephens v. S. Atl. Canners, Inc.*, 848 F.2d 484, 489-90 (4th Cir. 1988).

Soon after *Kolstad*, we reviewed a § 1981 punitive-damages award in *Lowery*. Renee Lowery and Lisa Peterson alleged that Circuit City Stores, Inc. ("Circuit City") failed to promote them because of racial animus. Circuit City was found liable under Title VII and § 1981, and the jury awarded punitive damages of $225,000. On appeal, Circuit City asserted that the record did not support punitive damages. Notably, we found punitive damages

recoverable only under § 1981 and limited our analysis accordingly. *Lowery*, 206 F.3d at 441.

We explained, "*Kolstad* teaches that we . . . must first ask whether the record contains sufficient evidence for a reasonable juror to find that in intentionally refusing to promote the plaintiff . . . the decision maker did so in the face of a perceived risk that her decision would violate federal law." *Id.* at 443. We continued, "If the answer is no, we should vacate the portion of the judgment awarding the plaintiff punitive damages and direct entry of judgment as a matter of law in favor of Circuit City on that issue." *Id.* In the end, we found that the record did contain sufficient evidence because Circuit City had presented "evidence that it required every person in management to attend a week-long training seminar that included education on the federal anti-discrimination laws." *Id.* (citing *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1246 (10th Cir. 1999) (finding sufficient evidence where the offending manager "testified that he was familiar with the accommodation requirements of the ADA and its prohibition against discrimination and retaliation in the workplace")).

We considered the same legal issue in subsequent cases. Sufficient evidence was found where a supervisor who engaged in sexual harassment "testified that he had seen an EEOC poster regarding sexual harassment" at work that read, "Sexual harassment is unlawful and unacceptable in the workplace." *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002). Although the supervisor denied reading the poster, we found that "a reasonable jury

could nevertheless infer that [his] awareness of the poster suggested at least a rudimentary knowledge of its import." *Id.* Sufficient evidence was also found where a manager "was specifically aware of FedEx's internal ADA compliance policy, and had received training from FedEx on the ADA's compliance requirements." *E.E.O.C. v. Fed. Express Corp.*, 513 F.3d 360, 373 (4th Cir. 2008).

By contrast, we declined to find sufficient evidence in *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc). Lisa Ocheltree sued her employer Scollon Productions, Inc., under Title VII because she "was the victim of severe or pervasive sex-based harassment in her workplace." *Id.* at 327. We "combed the record," however, and found "no evidence that would allow a jury to find that Scollon Productions knew, either directly or by imputation, that it might have been acting in violation of Ocheltree's 'federally protected rights.'" *Id.* at 336. Thus, we upheld the verdict on liability but vacated punitive damages. *Id.*

The case before us presents a scenario comparable to *Ocheltree*. WWNS has been unable to cite any evidence that DynCorp terminated the CivPol Subcontract "in the face of a perceived risk that [its] decision would violate federal law."[11] *Lowery*, 206 F.3d at 443. The district court likewise

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[11] WWNS cites only 41 C.F.R. § 60-1.4, which requires government contractors to adopt contractual language that pertains to discrimination against employees or applicants for employment under Title VII. However, the language nowhere mentions discrimination against minority-owned corporate subcontractors under § 1981.

failed to cite such evidence, and we could find none upon combing the record.[12] Accordingly, we conclude that the award of punitive damages should be vacated.[13]

2.

Even aside from the above error, the award of punitive damages could not stand because the district court's jury instruction on punitive damages was also

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[12] Judge Jones's opinion, dissenting in part, states that WWNS's July 26, 2006, letter to DynCorp indicates that DynCorp was warned about WWNS's federal right under § 1981. The letter itself, however, shows that this warning came after DynCorp had already terminated the CivPol Subcontract. The letter demands that DynCorp "comply with its obligations under the terms of the February 16, 2004, Subcontract and related Task Orders (collectively 'the Agreements')," but makes clear that DynCorp had already repudiated them. The letter states that "DynCorp has taken it upon itself to inform . . . WWNS employees . . . that the Agreements have been terminated," and that WWNS "consider[ed] DynCorp's conduct to constitute . . . a material breach of the Agreements." J.A. 2692. Because WWNS sent the letter after DynCorp had already terminated the CivPol Subcontract, the letter tells nothing about whether DynCorp previously acted "in the face of a perceived risk that [its] decision would violate federal law." *Lowery*, 206 F.3d at 443.

[13] Added to our rationale, DynCorp argues that the legal theory WWNS advanced was "novel or otherwise poorly recognized," *Kolstad*, 527 U.S. at 537, because whether a corporation may sue under § 1981 was never crystal clear. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 n.1 (2006) (noting that "we have no occasion to determine whether, as a corporation, it could have brought suit under § 1981" (emphasis omitted)); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977) (holding that "a corporation . . . has no racial identity and cannot be the direct target of . . . discrimination").

erroneous. "Instructions are adequate if construed as a whole, and in light of the whole record, they adequately inform the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 530 (4th Cir. 2002) (internal quotations omitted). "Even if instructions are flawed, there can be no reversal unless the error seriously prejudiced the challenging party's case." *Id.* (internal quotations omitted). Because DynCorp's objection to the district court's instruction on punitive damages was not preserved according to Federal Rule of Civil Procedure 51(d)(1), reversal would be proper "only when we can conclude that [the] particular jury instruction must necessarily have caused the jury to act in complete ignorance of, or to have misapplied, fundamentally controlling legal principles to the inevitable prejudice of an aggrieved party." *Spell v. McDaniel*, 824 F.2d 1380, 1399 (4th Cir. 1987); *see also* Fed. R. Civ. P. 51(d)(2).

In this case, the district court gave the following instruction: "[Y]ou may award punitive damages if WWNS . . . [has] shown by clear and convincing evidence that DynCorp maliciously, or with reckless indifference, discriminated against WWNS." J.A. 1771. Notably, the court never defined "malice" or specified to what "reckless indifference" refers. The word "malice" ordinarily means: "A desire to harm others or to see others suffer; extreme ill will or spite." *American Heritage Dictionary of the English Language* 1059 (4th ed. 2006). Unless properly instructed, a layperson would not know that "malice" also has a technical legal meaning relating to awareness that one may be breaking the law. *Cf.*

Perry v. McCaughtry, 308 F.3d 682, 694 (7th Cir. 2002) (Posner, J., dissenting) (arguing that a layperson would not without instruction know that "cause" had the technical meaning "substantial factor in"). Nor would a layperson assume that "reckless indifference" in the instruction specifically means "reckless indifference to federally protected rights." Accordingly, the jury could not have known that "'malice' or 'reckless indifference' pertain to [DynCorp's] knowledge that it may be acting in violation of federal law," *Kolstad*, 527 U.S. at 535, or that punitive damages are improper unless DynCorp acted "in the face of a perceived risk that [its] decision would violate federal law," *Lowery*, 206 F.3d at 443. Therefore, we believe the challenged instruction "caused the jury to act in complete ignorance of . . . fundamentally controlling legal principles." *Spell*, 824 F.2d at 1399.

Regarding whether DynCorp was prejudiced by the instruction, we note again that WWNS has not identified any evidence that DynCorp suspected that terminating the CivPol Subcontract might violate federal law, and we found no such evidence in the record. Notwithstanding, the jury awarded $10 million of punitive damages, which the district court concluded was "for DynCorp's Section 1981 violation." J.A. 1911. Therefore, we believe serious prejudice necessarily resulted from the challenged instruction.

3.

Although the punitive-damages award based on the § 1981 claim should be vacated, the jury's verdict complicates our disposition. The district court

instructed that punitive damages may be awarded on Counts 1 and 3-5. Among this group, DynCorp was found liable only on Count 1 (§ 1981 discrimination) and Count 3 (tortious interference with contract). The jury awarded $10 million of punitive damages, but the verdict does not specify how much was allocable to Count 1 rather than Count 3. For this reason, we cannot vacate the award without unwittingly vacating any punitive damages allocable to Count 3. Accordingly, the case must be remanded for retrial on punitive damages for Count 3.[14]

III.

For the reasons stated above, we affirm the district court's refusal to give DynCorp's proposed jury instruction pertaining to *Hill*, the court's denial of DynCorp's Rule 50(b) motion regarding the § 1981 claim, and all evidentiary rulings challenged by DynCorp. However, we reverse the court's denial of DynCorp's Rule 50(b) motion regarding WWNS's prayer for punitive damages based on the § 1981 claim, vacate the award of punitive damages, and remand the case for retrial on punitive damages for Count 3. Accordingly, we

AFFIRM IN PART AND REVERSE IN PART

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[14] Any reconsideration should take into account the standard for awarding punitive damages under Virginia law.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

After DynCorp International, LLC refused to renew its subcontract with Worldwide Network Services, LLC for information-technology services, Worldwide Services commenced this action, alleging that DynCorp's termination of the subcontract was motivated by racial animus and thus constituted racial discrimination in contracting, in violation of 42 U.S.C. § 1981. The subcontract had been entered into to assist DynCorp's performance of its contract with the State Department to support civilian police programs in Iraq and Afghanistan.

DynCorp maintained that it terminated its relationship with Worldwide Services because of Worldwide Services' poor performance and that the conceded racial animus of a mid-level manager, who lacked authority to end the relationship, was not imputable to the corporation under *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc) (holding that an employer will not be liable under Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act of 1967 ("ADEA") "for the improperly motivated person *who merely influences* the decision, but [only] for the person[s] *who in reality make[]* the decision" (emphasis added)). The district court refused DynCorp's request to apply Hill to this case and declined to give an instruction to the jury that would have barred imputation of the mid-level manager's racial animus to the corporation for purposes of determining liability under § 1981. The court stated, "[T]he jury doesn't have to specify which person did

what." The jury was thus allowed to consider the racial animus of individuals, including the mid-level manager, who may have influenced those who made the decision on behalf of DynCorp, but who were not themselves decisionmakers, in violation of *Hill*.

The majority approves this error by concluding that *Hill* does not apply to this case because some of the other DynCorp employees alleged to have acted with racial animus were high-level executives who may have had authority to decide not to renew Worldwide Services' subcontract, whereas *Hill* applies when the plaintiff's claim "rests . . . upon the discriminatory motivations of a subordinate employee." *Hill*, 354 F.3d at 291. What this reasoning overlooks, I respectfully submit, is the extent to which Worldwide Services' claim was based on the conceded racial animus of the mid-level manager, who clearly lacked authority to end the relationship between the two companies, but who was in a position to influence the decision to such an extent that the jury may have found that his racial bias was "a motivating factor in DynCorp's decision," which was all the district court required the jury to find before imposing liability on the corporation. Because Worldwide Services presented considerable evidence of this mid-level manager's racial bias and his role in the deterioration of the companies' relationship, the jury needed to be told that only the racial animus of DynCorp's actual decisionmakers could be considered in determining whether race motivated the *corporation's* decision.

Because *Hill* applies to determine when the racial animus of an employee is imputable to a corporation,

it was error for the district court to have refused to give an instruction under *Hill*. And because, in this case, the mid-level manager with racial animus may, as a factual matter, have substantially influenced the decision not to renew Worldwide Services' subcontract, the error was prejudicial. Accordingly, I believe that a new trial is necessary to permit the jury to resolve who DynCorp's decisionmaker or decisionmakers were and whether *they* were actually motivated by racial animus in deciding not to renew Worldwide Services' subcontract. Because I would grant DynCorp's request for a new trial, I would not reach the other issues addressed by the majority, with one exception. In view of the majority's determination to affirm on liability and to provide Judge Duncan with a majority on her discussion of punitive damages, I join her discussion of punitive damages, as contained in Parts II(D)(1) and (2).

I.

In February 2004, the ITS (International Technical Services) Division of DynCorp won a contract from the State Department to provide support for civilian police ("CIVPOL") programs in Iraq and Afghanistan. Thereafter, DynCorp awarded a subcontract to Worldwide Services to perform communication and information-technology services for the CIVPOL program pursuant to "task orders" issued by DynCorp. The subcontract's term extended one year (February 2004 to February 2005) and was renewable under four one-year options. DynCorp renewed the subcontract in February 2005 and again in February 2006, but not thereafter.

Worldwide Services was headed by Walter Gray and Reginald Bailey, both African Americans, and the company was certified by the Small Business Administration as a Section 8(a) disadvantaged company. Before its subcontract with DynCorp, Worldwide Services' annual revenue was about $100,000, which was produced primarily by providing information-technology services to local businesses. During the first year of its subcontract with DynCorp, however, Worldwide Services received over $20 million in revenues.

Richard Cashon, a DynCorp vice president and its program manager for the CIVPOL program, was charged with formally evaluating Worldwide Services' performance under the subcontract, and he gave it positive marks. In January 2006, Cashon rated Worldwide Services' performance as "exceptional" and "very good," noting Worldwide Services' "technical depth in terms of the number of technically competent individuals on their staff" and "flexib[ility] in terms of operating in a dynamic environment." Cashon wrote that he would have no reservations about using Worldwide Services in the future. A few months later, Cashon again rated Worldwide Services' work as "good" or "excellent" in every category and again stated that DynCorp "[w]ould . . . hire this contractor again."

Despite Cashon's positive evaluations, in early 2006 DynCorp received two letters from the State Department criticizing both DynCorp and Worldwide Services' performance. In the first letter, the Principal Deputy Assistant Secretary for the State Department's Bureau of International Narcotics and

Law Enforcement Affairs wrote a letter to DynCorp's CEO to complain about a number of defects in DynCorp's performance, including its supervision of Worldwide Services. The letter stated that "[Worldwide Services'] technical performance has in general been inadequate to the point where it has disrupted critical communications in the field." The letter also made clear that DynCorp's relationship with the State Department could be jeopardized if the problems were not resolved.

About three weeks later, a State Department representative in Baghdad sent a second letter to DynCorp that focused exclusively on the services provided by Worldwide Services in Iraq, and this letter was even more critical of Worldwide Services' performance. It concluded that "[a] great deal must be accomplished to improve many aspects of [Worldwide Services'] service provision, levels of expertise, project management and implementation strategies to effect acceptable standards of IT/communications support."

After receiving these letters, DynCorp developed a plan to manage Worldwide Services more actively. Bob Rosenkranz, the President of DynCorp's ITS Division, designated Richard Walsh, the Vice President for Operations, to serve as a "mentor" to help Worldwide Services improve its performance. Walsh began by having weekly meetings with Worldwide Services' executives Gray and Bailey, and in the first meeting Walsh emphasized that Worldwide Services was "in danger of losing [DynCorp's] business altogether" if its performance did not improve. In February 2006, Walsh traveled

to Afghanistan to observe Worldwide Services' performance on the ground and, as Walsh later testified, he found "[t]he situation . . . much worse than I had thought" and observed that "the basics were not being taken care of." Walsh was particularly concerned that those traveling into hostile areas were at greater risk because the high-frequency radio network, for which Worldwide Services had responsibility, was not working properly.

When Walsh shared his observations with Rosenkranz, Rosenkranz expressed hope that DynCorp could still "whip [Worldwide Services] into shape." Rosenkranz also described Worldwide Services as "one of the favored ones," suggesting that he shared Walsh's view that Worldwide Services received "protection" from Steve Cannon, DynCorp's CEO and the DynCorp executive most responsible for DynCorp's relationship with Worldwide Services.

In addition to Walsh's efforts, DynCorp also conducted internal investigations into Worldwide Services' performance in both Iraq and Afghanistan, and DynCorp's management received separate reports from these investigations. The report from Iraq, completed by June 19, 2006, noted that the "concern regarding the status of IT and the [Worldwide Services] team that provides that service to [DynCorp] is well-founded." But it also noted that "recent efforts by the [Worldwide Services] team to improve the situation are typically reaching positive results" and that "[t]he current situation is a contrast from what is typically perceived as a rather negative history." The report from Afghanistan, completed

between July 22-31, 2006, found that "the CIVPOL Afghanistan program suffers from a serious IT and [c]ommunications problem that is resulting in reduced program efficiency and effectiveness."

DynCorp's relationship with Worldwide Services suffered an additional serious blow when DynCorp received a third letter from the State Department – this time from the contracting officer overseeing the CIVPOL contract – complaining about Worldwide Services' performance. This letter, dated June 23, 2006, emphasized the State Department's "concern[s] about pervasive information technology (IT) performance deficiencies on all DynCorp Task Orders." After describing a number of specific issues, the letter concluded by requesting a meeting "to discuss this broad spectrum of information technology deficiencies," noting that "[t]he varied nature of these problems and their pervasiveness suggests that they are systemic." Shortly after DynCorp received this letter, its Board of Directors held a meeting, at which Cannon was questioned about the State Department's complaints. Cannon responded that "it might become necessary to replace the subcontractor in question." Four days later, however, Cannon resigned as President and CEO of DynCorp.

Cashon, the program manager, then decided not to issue any additional CIVPOL task orders to Worldwide Services in Iraq. While it was typical for the program manager to make such decisions, in this case there was evidence that Rosenkranz and Walsh participated in the decision. During the last week of July, Cashon also decided to allow all remaining

CIVPOL task orders directed to Worldwide Services to expire and not to renew DynCorp's subcontract with Worldwide Services.

Worldwide Services commenced this action alleging, among other things, that DynCorp's decision not to issue further task orders and not to renew its CIVPOL subcontract was the product of intentional racial discrimination, in violation of 42 U.S.C. § 1981. At trial, Worldwide Services presented five items of direct evidence to demonstrate racial animus.

First, Charles Jones, Worldwide Services' Deputy Program Manager in Iraq from March 2006 to August 2006, testified about racially offensive statements made by Leon DeBeer, DynCorp's Iraq IT Manager and the DynCorp employee to whom Worldwide Services' employees reported in Iraq. Specifically, Jones testified that in private conversations, DeBeer, a white South African, regularly referred to Worldwide Services' Walter Gray as a "nigger," a "bush native," and a "kaffir." He also testified that DeBeer regularly complained that white people "had made a grave error" by "tak[ing] the black man as a youth and attempt[ing] to clothe him and send him to school" because "the proper role of the black man was to go out and kill a lion, proving his manhood, at which point in time he should be put to work to feed his family" and "be mated with a woman so that he would have more children, who could then be put to work feeding the family."

Second, Jones testified that while he was in Iraq, he heard Mike Kehoe, DynCorp's Deputy Program Manager in Iraq for another State Department

contract, describe the acronym for Worldwide Network Services, "WWNS," as standing for "where white men never stay."

Third, John Mack, a part owner of Worldwide Services, testified that he once heard Walsh refer to Gray as "a stupid black mother –."

Fourth, Richard Spencer, a former DynCorp executive in the ITS Division who is Hispanic, testified about the lack of racial diversity among DynCorp's ITS executives and about his belief that his ethnicity played a role in the termination of his own employment.*

Finally, Spencer also testified about a dinner he attended in October 2006 for all of Rosenkranz's direct subordinates and their guests – approximately 40 persons – at which Bill Cavanaugh, DynCorp's Vice President for Business Development, presented Walsh with a shirt that said, "WWNS – I took them down, and all I got was this lousy T-shirt." Cavanaugh then proceeded to read a series of fictitious letters, the last of which purported to be

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* The majority attributes Spencer's termination to Rosenkranz and repeatedly refers to it as evidence of Rosenkranz's racial animus. But Spencer testified that while Rosenkranz signed his termination letter, Spencer had a "fairly good" relationship with Rosenkranz, who is "not a bad guy." Spencer instead suggested that his termination was the decision of Herb Lanese, DynCorp's CEO at the time, who did not like Spencer "for whatever reason." Moreover, Spencer did not attribute any racial motivation to Rosenkranz in signing the letter. Considered in its full context, Spencer's testimony about his termination should not be used to impute racial animus to Rosenkranz.

from Gray. According to Spencer, Cavanaugh read the letter, "mak[ing] a bad impression of Walter" by talking like "the character on Fat Albert" and using "his interpretation of Ebonics." Spencer testified that everybody laughed and that specifically Rosenkranz "was laughing his ass off" and Walsh was "laughing, happy."

Recognizing that the evidence most strongly described racial animus of DeBeer, DynCorp requested a jury instruction from the district court, based on Hill, limiting those employees whose racial animus would be imputable to the corporation. Its requested instruction provided in part:

> To the extent that [Worldwide Services] rests its discrimination claim upon the discriminatory motivations of a subordinate employee, [Worldwide Services] must show by the greater weight of the evidence that the subordinate employee possessed such authority to be viewed as the one principally responsible for the decision or the actual decisionmaker for DynCorp.

The district court refused to give the instruction, justifying its refusal by making a distinction between this case and *Hill*. The court noted that the *Hill* opinion was limited to employer liability under Title VII and the ADEA, whereas this case involves liability under § 1981. The court stated, "Plaintiffs pursuing claims under Title VII or the ADEA are subject to stricter scrutiny than those pursuing claims under Section 1981 because Title VII and ADEA actions must first proceed through the EEOC

process." The court noted that our decision in *Hill* has "never been extended beyond claims brought under Title VII and the ADEA," and it "decline[d] to be the first court to expressly do so." The court concluded that "the Hill standard is not a correct statement of law for claims brought under 42 U.S.C. § 1981."

Rather than limit DynCorp's discrimination liability under § 1981 to the standard stated in *Hill*, the district court instructed the jury that the "race of [Worldwide Services'] owners . . . must have been *a factor that actually led to the decision* . . . not to renew or extend [Worldwide Services'] CIVPOL subcontract or task orders." (Emphasis added).

The jury found that DynCorp's decision not to renew or extend Worldwide Services' CIVPOL subcontract or task orders was based in part on racial animus imputed to the corporation, and it returned a verdict in favor of Worldwide Services on its § 1981 claim, awarding it $3.42 million in compensatory damages and $10 million in punitive damages. From the judgment entered on the jury's verdict, DynCorp filed this appeal.

II.

DynCorp's decision not to renew its subcontract with Worldwide Services was a *corporate* decision, and the corporation's management testified that the corporate decision was made by executives whose motive for ending the relationship with Worldwide Services was only business oriented – based on Worldwide Services' poor performance, as graphically demonstrated by the three letters of complaint from

the State Department – and not for any reason of race.

Worldwide Services alleges that race was a motivating factor, and the vast bulk of its direct evidence of racial animus bore on DeBeer, the IT Manager in Iraq.

As a middle manager, DeBeer's views about Worldwide Services' performance were influential in that Cashon listened to executives both below and above him. But DeBeer was not the decisionmaker or even one of several possible decisionmakers. *Everyone at DynCorp testified that the person who had the authority to make the decision not to renew Worldwide Services' subcontract was Cashon*, the manager for the CIVPOL program, who concededly did not have any racial animus toward Worldwide Services. Indeed, he was a strong supporter of the firm until evidence started coming in about its deficiencies. There was also testimony that two other DynCorp executives, Rosenkranz and Walsh, participated in the decision. While there was some evidence of racial animus imputable to them, it was much weaker and more isolated than that imputed to DeBeer. Specifically, testimony showed that Rosenkranz and Walsh laughed at racial jokes directed at Worldwide Services told at a dinner and that Walsh once make a racial slur about Worldwide Services' Walter Gray.

In short, without the racial animus of DeBeer, no one can predict how the jury might have ruled. The record amply supports DynCorp's suggestion that, absent DeBeer's racial animus, the evidence may

have been too weak as a matter of law to support a § 1981 claim and that therefore DeBeer's racial animus was critical. Because the district court allowed DeBeer's racial animus to be considered by the jury in deciding whether DynCorp's decision was racially motivated, it is a real possibility that it allowed the jury to find § 1981 liability erroneously. This is because DeBeer, as the subordinate of Cashon, had influence on Cashon's decision on behalf of DynCorp. Without testimony of DeBeer's racial animus, the jury was essentially left with direct evidence that Rosenkranz and Walsh laughed at racial jokes about Worldwide Services and Walsh once spoke a racial slur about Gray.

Thus, it was likely critical to the jury's verdict whether DeBeer's racial animus could be imputed to DynCorp as a motivating factor in its not renewing Worldwide Services' subcontract. Had the district court applied *Hill*, the jury would have been told that DynCorp was not "liable . . . for the improperly motivated person [DeBeer] who merely influences the decision." *Hill*, 354 F.3d at 291. We explained in *Hill* that an employee, such as DeBeer, does not become a decisionmaker whose discriminatory motivations may be attributed to the employer "simply because he *had a substantial influence* on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision." *Id.* (emphasis added). If *Hill* had been applied, the jury would have been told that Worldwide Services had to prove that DeBeer "possessed such *authority* as to be viewed as *the one principally responsible for the decision* or the actual decisionmaker for the employer" before it could consider the impact of DeBeer's racial animus. *Id.*

(emphasis added). Based on the testimony in this record that Cashon made the decision with Rosenkranz and Walsh and that DeBeer did not have the authority of one principally responsible for the decision but could only be tagged as one having influence on it, DeBeer's racial animus would not have been imputable to DynCorp.

In limiting a corporation's liability for racial discrimination in *Hill* to the conduct of persons actually responsible for the corporation's action, we carried out Congress' intent to hold a corporation responsible for racial discrimination only when its executives and employees *responsible* for the corporation's decision acted with racial animus, not when any corporate employee manifested racial animus.

The district court, however, rejected the application of *Hill* to § 1981 and instead instructed the jury that the race of Worldwide Services' owners "must have been a factor that actually led to the decision" to terminate DynCorp's relationship with Worldwide Services. As a result, the jury was permitted to consider the racial animus *of any employee* whose influence "*actually led* to the decision." The district court thus extended corporate liability for § 1981 to the actions of any person who influenced the decision, regardless of whether that person was a decisionmaker. If *Hill* was applicable, the district court's instruction was legally erroneous.

Not only was the district court's instruction erroneous under *Hill*, if *Hill* was applicable, the error was material to the outcome in this case. Without

consideration of DeBeer's racial animus, the evidence to support a verdict was thin, perhaps even fatally thin, and the district court surely recognized this. It devoted substantial discussion to why it decided not to give the *Hill* instruction, concluding that *Hill* was "not a correct statement" of § 1981 law and that corporate agency for discrimination under Title VII was "subject to stricter scrutiny" than corporate agency under § 1981. Indeed, the court acknowledged the importance of *Hill* when it stated that it "adopted whole cloth DynCorp's proffered Section 1981 jury instructions, *excluding only the language specifically addressing Hill's holding*." (Emphasis added).

The dispositive question on appeal, therefore, reduces to whether *Hill* accurately describes when the racial animus of corporate employees may be imputed to a corporation for purposes of the corporation's liability for racial discrimination under § 1981. I submit that how racial animus is imputed to a corporation for corporate liability is the same issue, whether discrimination is alleged to be in violation of Title VII or of § 1981, as we have so recognized. Indeed, the majority, too, assumes that *Hill* applies to § 1981 claims. This assumption is, I believe, correct and determinative of this appeal.

III.

In *Hill*, a former Lockheed mechanic, whose employment was terminated on the basis of three written reprimands, brought an action against her corporate employer under Title VII and the ADEA, alleging that her team's safety inspector's

discriminatory animus led him "to report admittedly valid infractions," resulting in her second and third reprimands. *Hill*, 354 F.3d at 283. Hill's claim therefore rested on her argument that the safety inspector's alleged discriminatory animus should be imputed to the corporation. Hill did not dispute that she had violated corporate rules and standards, and she did not assert that her direct supervisors, who issued the reprimands, or her two program managers, who terminated her employment, acted with discriminatory animus. The district court granted Lockheed's motion for summary judgment, and we affirmed. We held that Hill could not base a claim on the safety inspector's animus because he was not one of the corporation's decisionmakers with respect to the decision to issue reprimands to Hill or to terminate her employment.

In reaching this result, we held that "an employer will be liable not for the improperly motivated person *who merely influences the decision* [to take an adverse employment action], but for the person who in reality makes the decision." *Hill*, 354 F.3d at 291 (emphasis added). To be sure, we did not limit corporate liability under Title VII and the ADEA to the actions of only "*formal* decisionmakers for the employer," because doing so might allow employers "to insulate themselves from liability simply by hiding behind the blind approvals, albeit non-biased, of formal decisionmakers." *Id.* at 290 (emphasis added). But we also rejected the notion that the discriminatory motivations of an employee may be attributed to the employer "simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse

employment decision." *Id.* at 291. Thus, we concluded that in determining a corporation's liability under Title VII or the ADEA, the focus must be on the motivations of those agents of the corporation *who actually made the adverse employment decision* on behalf of the corporation:

> In sum, to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

Id.

Even though *Hill* defined corporate liability under only Title VII and the ADEA, the agency issue resolved in *Hill* exists under any discrimination statute creating corporate liability. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). More to the point, in § 1981 claims, courts must answer the same "general question [of] the proper extent of a[] [corporate] employer's responsibility for the offensive acts of its employees." *Dennis v. County of Fairfax*, 55 F.3d 151, 155 (4th Cir. 1995). And Congress, in drafting § 1981, need not have provided an explicit direction to be clear that this question "implicates principles of agency law." *Id.* at 155. Indeed, we have previously recognized that the same general agency principles apply in interpreting § 1981 as

apply in interpreting Title VII. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184, 186–90 (4th Cir. 2001) (noting that under both § 1981 and Title VII there must be "some basis for imposing liability on [the corporate defendant]" and analyzing the employer's liability for a racially hostile work environment without distinguishing between the two statutes (internal quotation marks and citation omitted)); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000) (using the Title VII standard for imputing liability to a corporate employer for conduct alleged to justify punitive damages under § 1981).

Moreover, it would be analytically discordant not to apply Title VII agency principles to § 1981 agency questions. An employee alleging that his corporate employer intentionally discriminated against him on the basis of race, in violation of both Title VII and § 1981, would oddly be able to demonstrate his employer's liability under § 1981 for the discriminatory motivations of an employee who substantially influenced, but did not make, the decision to take an adverse employment action against him, but he would not be able to do so under Title VII. Similarly, an employee alleging intentional discrimination on the basis of sex or religion premised on a subordinate employee's influential animus would have no recourse, while her coworker's analogous § 1981 claim would succeed. While we must recognize that Title VII and § 1981 provide "separate, distinct, and independent" causes of action, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), the standard for imputing racial animus to a corporation in making out each claim

must, out of logical and practical necessity, be the same.

Worldwide Services argues bluntly that *Hill* should not be expanded because it was erroneously decided, relying on decisions in other circuits that have criticized Hill. See *Poland v. Chertoff*, 494 F.3d 1174, 1182-83 (9th Cir. 2007) (finding *Hill*'s rule too narrow and holding instead that "even if the biased subordinate was not the principal decisionmaker, the biased subordinate's [improper] motive will be imputed to the employer if the subordinate influenced, affected, or was involved in the adverse employment decision"); *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 487 (10th Cir. 2006) (critiquing *Hill*'s "peculiar focus on who is a decisionmaker for purposes of discrimination actions" on the ground that, under agency law principles, an employer's agents "include[] not only 'decisionmakers' but other agents whose actions, aided by the agency relation, cause injury" (internal quotation marks and citation omitted)); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (criticizing *Hill* as "inconsistent with the normal analysis of causal issues in tort litigation"); *cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2689 (2009) (Alito, J., concurring) (noting circuit split and describing *Hill* as adopting "[t]he least employee-friendly standard" by "ask[ing] only whether 'the actual decisionmaker' acted with discriminatory intent"). But, it would be inappropriate for us to limit *Hill* arbitrarily, which is precisely what we would have to do in order to conclude that the agency principles announced in *Hill* do not apply to § 1981 actions. Worldwide Services' argument that *Hill* was wrongly decided can only be directed to this court

sitting *en banc*.

In sum, the issue of when to impute the racial animus of an employee to a corporation for liability under Title VII and § 1981 must be and, indeed, is the same. *See Spriggs*, 242 F.3d at 184, 186-90; *Lowery*, 206 F.3d at 441. It was thus prejudicial error for the district court to have concluded that the standard was different and to have refused to instruct the jury on the Hill standard for determining whether the racial animus of DeBeer was imputable to DynCorp in connection with DynCorp's decision not to renew the subcontract with Worldwide Services. Because a new trial on Worldwide Services' § 1981 claim is thus required, I would vacate the judgment on the § 1981 claim, including the award of punitive damages, and remand for a new trial, requiring the district court to instruct the jury on *Hill*.

JONES, Chief District Judge, concurring in part and dissenting in part:

I join with Judge Duncan in affirming the district court's refusal to instruct the jury based on *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), its denial of a Rule 50(b) motion on the plaintiff's § 1981 claim, and its evidentiary rulings. However, I would also affirm the district court's refusal to set aside the jury's punitive damage award.[1]

The majority finds that there was insufficient evidence to support an award of punitive damages as to the § 1981 claim. To the contrary, I believe that there was ample evidence that DynCorp International, LLC ("DynCorp") terminated the subcontract it entered into with Worldwide Network Services, Inc. ("WWNS") to provide communication and information-technology services for the U.S. State Department's Civilian Police programs in Iraq and Afghanistan ("CivPol Subcontract") in the face of knowledge that "it may be acting in violation of

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[1] The result of the majority holding in this appeal is to remand the case for a new trial solely on to the issue of punitive damages as to Count 3, tortious interference with contract. Punitive damages on that count will be capped by state law at $350,000. Va. Code Ann. § 8.01-38.1 (2007). Under Judge Niemeyer's view of the case, the case would be remanded for a new trial as to both liability and damages on the § 1981 claim. Because there is no statutory cap on § 1981 punitives, this result would preserve the possibility of a larger punitive damage award – perhaps as much as $10 million, as awarded by this jury. If WWNS had its option, it might prefer Judge Niemeyer's result, but of course we do not decide legal issues on the basis of the parties' preferences.

federal law." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999).

Indeed, DynCorp was warned by WWNS that ending the CivPol Subcontract might violate WWNS's federally protected rights. On July 26, 2006, WWNS sent DynCorp's in-house counsel a letter, via e-mail and overnight mail, demanding that DynCorp immediately "comply with its obligations under the" CivPol Subcontract and informing DynCorp that WWNS had "evidence that DynCorp's actions have been racially-motivated in violation of federal anti-discrimination laws." (J.A. 2692.) The evidence also shows that the executives who made the decision to terminate the CivPol Subcontract were aware of the contents of this letter. On July 26, 2006, WWNS Chairman and CEO, Walter Gray, wrote two of DynCorp's decisionmakers, Richard Cashon and Robert Rosenkranz – as well as Herb Lanese, the CEO of DynCorp – to confirm that DynCorp's in-house counsel received the letter "regarding [DynCorp's] wrongful and improper conduct in terminating [WWNS's] services under the CivPol subcontract." (J.A. 2694.) Richard Walsh, Division Vice-President of Operations for DynCorp, later e-mailed an internal PowerPoint presentation to other DynCorp executives including Cashon, outlining the eventual termination of the CivPol Subcontract. One of the slides of the presentation stated that "[r]ecent correspondence indicate[s] that WWNS is planning legal action against [DynCorp] based on racial discrimination." (J.A. 2788.)

Comparing this case to *Anderson v. G.D.C., Inc.*, 281 F.3d 452 (4th Cir. 2002), it is clear a jury could

reasonably conclude from the July 26 letter that DynCorp's decisionmakers discriminated against WWNS "in the face of a perceived risk that its actions will violate federal law." *Kolstad*, 527 U.S. at 536. In *Anderson*, one of the defendant's employees was found to have sexually harassed the plaintiff in violation of Title VII, a federal law prohibiting discrimination on the basis of sex. 281 F.3d at 458-59. The only evidence presented that the employee knew of the Title VII prohibition was that he looked at, but did not read, a poster entitled "Sexual Harassment," advising employees of proper workplace conduct. *Id.* at 460. Nevertheless, this court found that the employee's mere "awareness" of the poster "suggested at least a rudimentary knowledge of its import" sufficient to pass the *Kolstad* test. *Id.*

Here, the DynCorp decisionmakers were directly warned, and even anticipating, that they would have to confront litigation for racial discrimination if they continued to pursue the termination of the CivPol Subcontract. Their level of awareness of WWNS's federally protected rights was therefore well beyond that of the employee in *Anderson* who at most saw the title of a poster on a wall.

DynCorp argues that, even if the July 26 letter did put the decisionmakers on notice, it came too late to avoid violating § 1981, but I find little merit to this argument. The letter was sent well before WWNS had ceased operations under the CivPol Subcontract in either Iraq or Afghanistan. Not only were the task orders under the CivPol Subcontract still in effect, but DynCorp had not yet notified WWNS of its

intention to let any of the task orders expire.

The task order in Iraq was not scheduled to end until August 11, 2006. Although DynCorp formally informed WWNS in a letter dated July 28, 2006, that DynCorp intended to let the personnel portion of this task order expire, DynCorp also extended its purchase of services from WWNS in Iraq another thirty days.

Moreover, the four task orders in Afghanistan continued until August 31, September 8, September 30, and October 9, 2006, months after WWNS's warning. According to the CivPol Program Manager Richard Cashon, "The task orders in Afghanistan had a little bit more time on them . . . . It could have been conceivable to continue with WWNS in Afghanistan, if the situation dictated it, even though we were transitioning out of Iraq." (J.A. 1678.) According to DynCorp's own PowerPoint presentation, the "[f]inal transition" from WWNS was not set to occur until October 9, 2006. (J.A. 2791.) Thus, even if, by July 26, 2006, DynCorp's decisionmakers were already scheming to terminate the CivPol Subcontract, they still had plenty of time to reverse their decision in order to avoid violating § 1981.

Accordingly, I find that there was sufficient evidence that DynCorp was aware that its actions might violate WWNS's federally protected rights,[2]

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[2] It is true, as Judge Duncan points out, that in affirming the punitive damage award, the district court did not cite any evidence that DynCorp had knowledge that it might violate § 1981. However, DynCorp never claimed below that it lacked knowledge of WWNS's federally protected rights.

and I would not vacate the punitive damage award on this ground.

In addition, because DynCorp did not properly object to the district court's punitive damage instruction to the jury, and because the instruction given did not prejudice DynCorp, I would not vacate the award on that ground.

Finally, the amount of the punitive damage award does not violate due process, as argued by DynCorp, and is not assailable for that reason. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (holding that a single digit ratio, especially four to one or less, between punitive and compensatory damages is "likely to comport with due process").

For these reasons, while I otherwise agree with Judge Duncan, I respectfully dissent from setting aside the jury's punitive damage award.

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IN THE
Supreme Court of the United States

WORLDWIDE NETWORK SERVICES, LLC AND
WORLDWIDE NETWORK SERVICES INTERNATIONAL, FZCO,
Petitioners,

v.

DYNCORP INTERNATIONAL LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL URBAN LEAGUE AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici the National Urban League and the Washington Lawyers' Committee for Civil Rights and Urban Affairs are interested in this case because the Court's decision in this matter will directly affect the ability of African-Americans to participate fully in our nation's economic life without facing the invidious barriers of discrimination.

The National Urban League

Established in 1910, the National Urban League is the nation's oldest and largest community-based movement devoted to empowering African-Americans and other disadvantaged people to enter the economic and social mainstream. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of its local affiliates.

The mission of the National Urban League movement is to enable African-Americans and other disadvantaged people to secure economic self-reliance, parity, power, and civil rights. The National Urban League seeks to implement that mission by, among other things, empowering all people in attaining economic self-sufficiency through education, health care, job training, good jobs, home ownership, entrepreneurship, and wealth accumulation; and promoting

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

and ensuring our civil rights by actively working to eradicate all barriers to equal participation in all aspects of American society, whether political, economic, social, educational, or cultural.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, headquartered in Washington, D.C., is a non-profit civil rights organization established to eradicate discrimination by enforcing federal and local civil rights laws through litigation in the federal and state courts. During the Committee's 40-year history, it has represented thousands of individuals discriminated against on the basis of race, gender, national origin, religion, disability, and other protected categories, and in cases alleging discrimination in employment, public accommodations, housing, education, and various types of contractual contexts. The Committee's cases range in size from individual matters to nationwide pattern-and-practice cases. Leveraging the *pro bono* resources of the private bar, the Committee provides tens of thousands of hours of legal representation to victims of discrimination each year.

From its extensive civil rights litigation experience, the Committee has amassed expertise in the issues of law and procedure raised in the present matter. The Committee's lawyers regularly litigate cases alleging claims under 42 U.S.C. § 1981, including claims for which punitive damages are requested as relief. The Committee also frequently litigates within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, and thus has substantial familiarity with Fourth Circuit jurisprudence on punitive damages and other relevant issues.

PRELIMINARY STATEMENT

As the jury found, the facts of this case are extraordinary. Respondent DynCorp International LLC ("DynCorp") engaged in deliberate and egregious racial discrimination that nearly destroyed the business of Petitioners Worldwide Network Services, LLC and Worldwide Network Services International, FZCO (collectively, "WWNS"). High-level DynCorp executives:

- Used the harshest racial slurs – "nigger," "kaffir," "bush baby," "stupid black mother . . . ." – to demean a WWNS executive, Pet. App. 11a-12a, Pet. 4;
- Complained "'[t]wo to three times a week' that 'people of Anglo descent . . . had made a grave error' because they 'had taken the black man as a youth and attempted to clothe him and send him to school' and that 'the proper role of the black man was to go out and kill a lion, proving his manhood, at which point in time he should be put to work to feed his family . . . and mated with a woman so that he would have more children, who could then be put to work feeding their family,'" Pet. App. 12a (alterations in original);
- Drove a WWNS manager from his workplace at gunpoint, *see id.* at 11a;
- Stole all of WWNS's non-managerial employees, *see id.*;
- Stopped processing or paying WWNS invoices for completed work, *see id.*; and
- Ultimately "celebrated WWNS's demise during a company dinner" at which one senior executive read a fictionalized letter from WWNS in

> Ebonics (to the delight and laughter of those in attendance), while another was officially presented with a T-shirt reading "WWNS – I took them down, and all I got was this lousy T-Shirt," *id.* at 12a-13a.

The jury found DynCorp liable for violating 42 U.S.C. § 1981 and awarded WWNS punitive damages. *See id.* at 16a-17a.

This Court held in *Smith v. Wade*, 461 U.S. 30 (1983), that a jury may award punitive damages when – as here – "the defendant's conduct is shown to be motivated by evil motive or intent, *or* when it involves reckless or callous indifference to the federally protected rights of others." *Id.* at 56 (emphasis added) (interpreting 42 U.S.C. § 1983); *see* Pet. 9 ("There is no dispute in this case that the same standard governs claims arising under 42 U.S.C. § 1981.") (citing cases).

In later interpreting the similar standard for punitive damages that Congress adopted under 42 U.S.C. § 1981a(b)(1) – "malice or . . . reckless indifference to the federally protected rights of an aggrieved individual" – this Court identified two different ways that a plaintiff may prove that a defendant acted with "the requisite mental state." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534-35 (1999). First, "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive.'" *Id.* at 538. Alternatively, because a defendant can be liable for punitive damages even without "a showing of egregious or outrageous discrimination independent of the employer's state of mind," a defendant is liable for punitive damages if the plaintiff establishes "the [defendant]'s knowledge that it may be acting in violation of federal law." *Id.* at 535. A plaintiff may

use either method of proof to show that the defendant "discriminate[d] in the face of a perceived risk that its actions will violate federal law." *Id.* at 536.

In this case – and in others on which the court of appeals relied in reaching its decision here – the Fourth Circuit ignored this Court's clear holding in *Kolstad* that "egregious misconduct is evidence of the requisite mental state." *Id.* at 535. Instead, over the dissent of Chief District Judge Jones, the court of appeals vacated the jury's award of punitive damages because it could find no evidence that DynCorp knew that it might be violating WWNS's rights under § 1981. *See* Pet. App. 34a-35a. For the reasons explained by Petitioners, that holding is inconsistent with this Court's decisions and in conflict with decisions of the First, Second, Third, Sixth, Eighth, and Ninth Circuits. *See* Pet. 8-15.

Amici urge the Court to grant the petition because the question presented in this case is an exceedingly important one. Courts across the nation look to this Court's decisions in *Wade* and *Kolstad* to evaluate claims for punitive damages under numerous federal civil rights statutes. *See* Pet. App. 31a; Pet. 8-9 & n.3. Because discrimination in contracting and employment has proven harmful to the economy and society as a whole, and because the availability of punitive damages is particularly essential for combating discrimination in those areas, this Court should grant the petition and ensure that punitive damages remain an effective tool to deter the most egregious forms of discrimination under § 1981 and other civil rights laws, as Congress clearly intended.

ARGUMENT

I. DISCRIMINATION IN CONTRACTING AND EMPLOYMENT HARMS THE ECONOMY AND HARMS SOCIETY

This case involves egregious, overt racial discrimination in contracting that violated WWNS's rights under § 1981. *See supra* pp. 3-4. The Fourth Circuit's refusal to follow this Court's approach in *Kolstad*, in contrast to the vast majority of other circuits, makes punitive damages effectively unavailable even in the most egregious cases of intentional discrimination. As a result, such discrimination will be undeterred, leading to potentially serious harms to the economy and society as a whole.

Racial discrimination "'results in a clear and potentially serious loss of efficiency'" by the misdistribution of resources. Billy J. Tidwell, The National Urban League, Inc., Research Dep't, *The Price: A Study of the Costs of Racism in America* 71-72 (July 1990) (quoting Thomas F. D'Amico, *The Conceit of Labor Market Discrimination*, *in* Papers and Proceedings of the Ninety-Ninth Annual Meeting of the American Economic Association, *The Economics of Discrimination Thirty Years Later*, 77 Am. Econ. Rev. 310, 310 (May 1987)). As one researcher has explained:

> When society's rewards and penalties are distributed to its members in a manner not consonant with their relative productivities, then at least some scarce resources are bound to be overallocated to relatively unproductive members of the "favored" race . . . and underallocated to more productive members of the race being discriminated against . . . . Society's aggregate real output, therefore, will fall below its potential . . . .

Id. (quoting D'Amico, 77 Am. Econ. Rev. at 310) (ellipses in original). As a result, "[t]he economic future of this country is in large part dependent on the increases in productivity that will be realized when society allows people of color to reach their full potential by dismantling the barriers erected by contractual discrimination." Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 Geo. Wash. L. Rev. 183, 188 (1993).

Moreover, the disparities created by discrimination in contracting and employment are felt – and compounded – for generations. Beyond the "cumulative impact of pervasive acts of racial discrimination," which "can be debilitating over the course of an individual's lifetime," the "lingering effects of past contractual discrimination . . . are largely responsible for the fact that communities of racial minorities (African Americans in particular) enjoy a disproportionately small share of society's bounty as each successive generation passes along its inherited economic disadvantage to the next." *Id.* at 187.

As long as African-Americans are subject to significant discrimination that limits their career opportunities and the opportunities of their businesses, they have reduced incentives to maximize their skills. Simply put, there is less incentive to develop one's human capital if a person believes that that development will not be rewarded because of his or her race:

> There are strong arguments that racial discrimination, in fact, hampers the efficiency of markets by creating disincentives for the optimal acquisition of human capital by racial minorities. . . . [T]o the extent that racial discrimination is eradi-

> cated, economic benefits will accrue to the society as a whole due to the enhanced productivity of people of color.

Id. at 216; *see also* Samuel Issacharoff, *Review Essay: Contractual Liberties in Discriminatory Markets*, 70 Tex. L. Rev. 1219 (1992); BNet Business Network, *Commentary: Erase Institutional Racism, Boost Local Economy*, Long Island Bus. News (Apr. 29, 2005) ("[A]s we confront the socioeconomic challenges of a global economy, the fastest way to expand our regional economy is to create equal opportunities for everyone."), *at* http://findarticles.com/p/articles/mi_qn4189/is_20050429/ai_n14606294?tag=content;col1.

Moreover, intentional discrimination causes more than economic harm. "[I]ntentional discrimination is a different kind of harm, a serious affront to personal liberty." *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003). "Freedom from discrimination on the basis of race or ethnicity is a fundamental human right recognized in international instruments to which the United States is a party, and the intentional deprivation of that freedom is highly reprehensible conduct." *Id.* (citing International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force for the United States Nov. 20, 1994)); *see also Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000) (finding that plaintiff's termination on the basis of her sex was "more reprehensible than would appear in a case involving economic harms only"); *Zarcone v. Perry*, 572 F.2d 52, 55 (2d Cir. 1978) ("It cannot be that it is less important to deter intentional deprivations of fundamental constitutional rights . . . than it is to deter intentional injuries to personal property interests.").

As Congress and commentators alike have observed, "the harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same," and they include "humiliation; loss of dignity; psychological (and sometimes physical) injury," and "damage to the victim's professional reputation and career." H.R. Rep. No. 102-40(I), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603 ("Edwards Report"); *see also* Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 8 (1976) ("Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.").

Ultimately, the economic and non-economic injuries caused by discrimination harm society and betray the aspiration and promise of the Reconstruction Amendments. *See Zhang*, 339 F.3d at 1043 ("There can be no question of the importance of our society's interest in combating discrimination; this nation fought the bloodiest war in its history in part to advance the goal of racial equality, adding several amendments to the Constitution to cement the battlefield victory."). "[T]olerating racial discrimination and its effects constitutes an anathema to any claim that society is fair and just." Williams, 62 Geo. Wash. L. Rev. at 187-88.

Punitive damages are a critical tool for ensuring a fair and just society that does not tolerate illicit discrimination. Without robust and consistent imposition of punitive damages in appropriate cases, "tortfeasors lack adequate incentives to refrain from

or minimize harmful conduct because their expected liability will be less than their expected benefit." Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 Harv. C.R.-C.L. L. Rev. 279, 287 (2001). Punitive damages are thus important in discrimination cases because they compel those who engage in illicit discrimination to "internalize[] the full cost of the harm that [they] cause[] even when the conduct is not always detected." *Id.*

II. PUNITIVE DAMAGES ARE AN ESSENTIAL TOOL FOR DETERRING AND COMBATING ALL FORMS OF DISCRIMINATION

A. Numerous Civil Rights Statutes Rely on Punitive Damages To Deter and To Punish Discrimination

Clarifying the proper standard for imposing punitive damages in discrimination cases is important because Congress and the federal courts have applied a uniform standard for punitive damages to a variety of civil rights statutes, including 42 U.S.C. §§ 1981 and 1983, Title VII (42 U.S.C. § 1981a), the Fair Housing Act ("FHA") (42 U.S.C. § 3613(c)(1)), and the Americans with Disabilities Act of 1990 ("ADA"). *See Kolstad*, 527 U.S. at 534-38 (§ 1981a); *Wade*, 461 U.S. at 56 (§ 1983); *Quigley v. Winter*, 598 F.3d 938, 952-53 (8th Cir. 2010) (FHA); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000) (§ 1981); *Criado v. IBM Corp.*, 145 F.3d 437, 445 (1st Cir. 1998) (ADA). Just as the same standard for punitive damages applies across numerous civil rights statutes, there is the same need to ensure that the threat of punitive damages remains genuinely available to deter and to punish all forms of intentional discrimination. *See* Edwards Report at 65, *reprinted*

in 1991 U.S.C.C.A.N. 603 ("Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well.").

The purposes of punitive damages in civil rights cases are principally to deter and to punish. Across all federal civil rights statutes, the "focus" in determining the propriety of punitive damages "is on the character of the tortfeasor's conduct – whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Wade*, 461 U.S. at 54; *see Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 551 (10th Cir. 1999) ("The purpose of punitive damages is 'to punish what has occurred and to deter its repetition.'") (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)). Moreover, punitive damages are intended to act as both a general and a specific deterrent – "to deter others as well as the particular defendant." *Zarcone*, 572 F.2d at 56.

B. Punitive Damages Are Crucial to Enforcing Federal Civil Rights Statutes

Robust enforcement of the twin goals of punishment and deterrence is crucial to the success of federal civil rights statutes to remedy and eradicate discrimination. Punitive damages turn on "the actor's state of mind." *Kolstad*, 527 U.S. at 535. It is a defendant's reprehensible mental state of malice or callous indifference resulting in deliberate discrimination that must be deterred. *See id.* at 538 ("Conduct warranting punitive awards has been characterized as 'egregious,' for example, *because* of the defendant's mental state."). Often, it is only punitive damages that can deter conduct that springs from a malicious state of mind.

Punitive damages ensure that the total financial impact of a plaintiff's successful discrimination lawsuit will deter future conduct by a defendant with a malicious or callous mental state and a proven willingness to engage in illicit discrimination. *See* Edwards Report at 70, *reprinted in* 1991 U.S.C.C.A.N. 608 ("Data suggests that employers do indeed implement measures to interrupt and prevent employment discrimination when they perceive that there is increased liability.") (quoting "Dr. Freada Klein, one of the foremost experts on the sexual harassment in the workplace and a consultant to leading corporations"). Without appropriate deterrence in the form of punitive damages, a defendant with a proven willingness to discriminate may continue to do so whenever a plaintiff is unwilling or unable to establish substantial compensatory damages. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 819 (9th Cir. 2001) ("But for [plaintiff]'s decision that he couldn't take it any longer and thus had to quit, nothing in the record suggests that [defendant] would have done anything to address a workplace replete with racial and ethnic slurs . . . . The fact that the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision does not deflate its magnitude.").

Compensatory damages vary from case to case and address the economic harm to a plaintiff; they do not address the underlying reprehensibility of a defendant's mental state that led to the specific harms suffered by the plaintiff – and perhaps countless other silent victims. Depending on a number of factors, a defendant's reprehensible state of mind may or may not result in damages of any significance to the defendant. Sometimes a defendant's reprehensible

mental state results in significant compensatory damages to the plaintiff, and sometimes it does not; sometimes a defendant's reprehensible mental state is manifested in overt discrimination, and sometimes the discrimination is difficult to detect;[2] and sometimes a plaintiff is willing to endure a lengthy lawsuit to vindicate her rights, and sometimes she is not. *See* Moran, 36 Harv. C.R.-C.L. L. Rev. at 284-96 (discussing the importance of punitive damages to deter discrimination in light of the difficulty of obtaining meaningful compensatory awards).

Indeed, scholars recognize that "[c]ompensatory damages are insufficient, and punitive damages necessary, to deter wrongful conduct in at least four instances," all of which pervade discrimination lawsuits:

> (1) when the harmful conduct is not always detected by the victim;
>
> (2) when the probability of recovery is low and does not offer an adequate incentive for every victim (or her attorney) to file suit;
>
> (3) when the harm that is recoverable through compensatory damages does not fully capture the harm caused by the conduct; and
>
> (4) when the wrongdoer derives illicit benefits from the conduct that exceed the value of the

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[2] *See, e.g., Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) ("Pay disparities often occur . . . in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. . . . Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.").

> harm when measured by compensatory damages alone.

Id. at 285; *see generally* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982).

Both Congress and this Court have recognized this important function of punitive damages, and the Fourth Circuit's decision here risks undermining it. One of the reasons Congress added a punitive damages remedy to Title VII was that, "[a]ll too frequently," the statute left "prevailing plaintiffs without remedies for their injuries and allow[ed] employers who discriminate to avoid any meaningful liability." Edwards Report at 68, *reprinted in* 1991 U.S.C.C.A.N. 606; *see* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 Wm. & Mary L. Rev. 735, 749-50 (2008) (reviewing legislative history and concluding that "the addition of new remedial relief to Title VII was a critical component of deterring future wrongful conduct and encouraging 'private enforcement' of the statute"). This Court, meanwhile, has recognized that, where a defendant's egregious conduct or mental state is difficult to detect or results in small compensatory damages, a greater magnitude of punitive damages can be appropriate to ensure adequate deterrence. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) ("Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value

of noneconomic harm might have been difficult to determine.").[3]

The Fourth Circuit's decision in this case disregards this Court's punitive damages rulings and weakens the important role of punitive damages in protecting citizens against unlawful discrimination. *Amici* urge the Court to grant the petition to address this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] In accordance with those principles, courts routinely uphold punitive damages awards in discrimination cases bearing those characteristics. *See, e.g.*, *Swinton*, 270 F.3d at 817-19 (where plaintiff was subject to "daily abuse featuring . . . perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry," and his employer "did absolutely nothing to stop it," upholding punitive damages to provide adequate deterrence in light of the fact that plaintiff "was paid only $8.50 per hour," "the personal distress and indignity visited upon [plaintiff] are difficult to calculate," and, "[b]ut for" plaintiff's lawsuit, nothing suggested that defendant would have addressed its pervasive discrimination) (internal quotation marks omitted); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1266-67, 1273 (10th Cir. 2000) (where plaintiff was subjected to pervasive sexual harassment, upholding punitive damages to provide adequate deterrence in light of "small amount of economic damages" for "injury [that] is primarily personal").

Respectfully submitted,

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